

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 628

THE INTERSTATE COMMERCE COMMISSION, J. M.  
KURN AND JOHN G. LONSDALE, TRUSTEES, ST.  
LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,  
APPELLANTS

VS.

COLUMBUS AND GREENVILLE RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

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1 In District Court of the United States for the Northern District of Mississippi, Eastern Division

Civil Docket No. 161

COLUMBUS AND GREENVILLE RAILWAY COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

*Original complaint*

*To the Honorable Judges of the District Court Aforesaid:*

Now comes the Columbus & Greenville Railway Company, a common carrier railroad corporation chartered, organized, and existing under and by virtue of the laws of the State of Mississippi, with its principal office situated in Columbus, Lowndes County, State of Mississippi, and within the Eastern Division of the Northern District of Mississippi, with its eastern terminus at Columbus and its western terminus at Greenville, all within the State of Mississippi, hereinafter referred to as Plaintiff, and complains of the United States of America, the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees), the Illinois Central Railroad Company and the Interstate Commerce Commission, hereinafter referred to as Defendants, and would, with respect, show unto the Court the following matters and facts, to wit:

1. That the Plaintiff, Columbus and Greenville Railway Company is a common carrier by rail, subject to the jurisdiction of the Interstate Commerce Commission under the provisions of the Transportation Act of 1920, as amended, in that said Railway Company is engaged in the transportation of goods moving in interstate commerce, and said Plaintiff has its home office and principal place of business situated in the City of Columbus, Lowndes County, State of Mississippi, within the Eastern Division of the Northern District of Mississippi, and said plaintiff is directly interested in and effected by an order of the Interstate Commerce Commission entered on the third day of January 2 A. D. 1942, in Cause No. 28590, effective February 26, 1942, but by order of February 13, 1942, extended as to effective date until April 28, 1942, in that the said Columbus & Greenville Railway Company is the respondent named in said order.

2. That the defendant, Illinois Central Railroad Company is a corporation duly and legally chartered, organized, and existing under and by virtue of the laws of the State of Illinois, but authorized to do and doing business within the State of Mississippi, with officers and agents within said state upon whom service of



process may be had, and particularly in the Northern District of said State; that the St. Louis and San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees), is a corporation duly and legally chartered, organized and existing under and by virtue of the laws of the State of \_\_\_\_\_, authorized to do and doing business in the State of Mississippi, and in the Northern District thereof; that the last-named corporation is being operated by J. M. Kurn and John G. Lonsdale, Trustees; that both of said railroad corporations are common carriers by rail, subject to the provisions of the Transportation Act of 1920, with amendments, and are directly interested in the order herein sought to be set aside, having become and been interveners before the Interstate Commerce Commission in the hearing and proceedings resulting in said order.

That the Interstate Commerce Commission and the United States of America are necessary and proper parties hereto under the provisions of Title 28 U. S. C. A., Sec. 41 Sub. 28 Judicial Code, Sec. 24 amended.

3. That this is a suit of which this court has venue and jurisdiction in this that it is brought to set aside in whole an order of the Interstate Commerce Commission, and to enjoin the enforcement of said order, and under the provisions of Title 28, U. S. C. A., Sections 41, et seq., the District Court is granted original jurisdiction of all suits brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission and the venue of said action relating to said orders where, as here, the order relates to transportation and the charges therefor is within the jurisdictional district wherein the domicile of the party, or any of the parties affected thereby.

The order complained of herein grew out of a proceeding before the Interstate Commerce Commission in Docket No. 28,590 thereof entitled "Cottonseed Allowances of the Columbus & Greenville Railway." On January 3, 1942, the Interstate Commerce Commission filed its report and order which are of record in the reports of the Interstate Commerce Commission in Vol. — at Page —, and said decision, findings of fact, report and order are set out in an exhibit hereto marked "A," to which reference is here prayed as often as may be necessary, and which exhibit is made a part hereof; that said order shown as a part of Exhibit "A" by its terms was to become effective on February 26, 1942, but upon petition of plaintiff herein an order was entered on February 13, 1942, extending the effective date of said original order to April 28, 1942, and said extension order is made Exhibit "B," copy thereof is attached hereto and asked to be considered and made a part hereof. That said order of January 3, 1942, effective as



extended on April 28, 1942, is the order herein sought to be restrained, enjoined, set aside, annulled and suspended.

4. That jurisdiction of this court depends upon subdivision 28 of Section 41, and Sections 43 and 45 to 48, both inclusive, of Title No. 28 of the United States Code, which provide for actions herein to enjoin, set aside, annul or suspend in whole or in part, any order of the Interstate Commerce Commission, and upon the further fact that this action arises under the Constitution and Laws of the United States of America, and that said action is brought to restrain, enjoin, set aside, and annul an order of the Interstate Commerce Commission.

5. Plaintiff would show that heretofore, after a report, order, and citation of Division 3 of the Interstate Commerce Commission wherein plaintiff was cited to show cause by formal return why its tariff No. 9 (b), I. C. C. No. 83 should not be amended so as to eliminate provisions contained therein under which the plaintiff was said to agree to make refunds to shippers of outbound traffic of cottonseed products from the mill point to which the inbound traffic of cottonseed had moved over the line of a common carrier by rail other than the plaintiff, which citation was made in investigation and Suspension Docket No. 4599 "Allowances on Cottonseed at C. & G. Ry. Points" reported in 238 I. C. C., 309. An investigation was instituted by the Interstate Commerce Commission upon its own motion. The investigation was docketed as No. 28,590 of the Interstate Commerce Commission, and the inquiry was made into and concerning the lawfulness of the rates, charges, rules, regulations, and practices published in the Columbus & Greenville Railway Company's freight tariff No. 9 (b), I. C. C. No. 81, which provided for adjustments, sometimes called "cut-backs" to shippers of outbound cottonseed products from manufacturing or mill points on the line of the Columbus and Greenville Railway Company in instances where the inbound shipment of cottonseed moved into the mill point over the lines of other rail carriers.

The tariff in question, Exhibit "C" hereto and made a part hereof, provides for the equalization of its outbound rates with those of plaintiff's intervening trunkline competitors. The tariff provision does not affect the amount of rates paid for the inbound movement of cottonseed to the mill point. Its affect is to reduce the outbound rate on cottonseed products to meet a competitive condition created by so-called "cut-back" rates of trunk line competitors, which "cut-back" rates tend to hold the outbound movement of cottonseed products from mill points to the lines of said competitors. The facts with reference to a typical movement is quoted in Exhibit "A" at pages 4 and 5 thereof.



The "cut-back" tariffs referred to are shown by Illinois Central Tariff No. —, Exhibit "D" hereto, and Frisco Tariff No. —, Exhibit "E" hereto, both of which are asked to be made and considered a part hereof.

6. The plaintiff contends and avers that to permit the order of January 3, 1942, effective April 28, 1942, to go into effect and to thereby cancel and condemn plaintiff's Tariff I. C. C. No. 81 will be to deprive the Plaintiff of its property without due process of law, contrary to the provisions of Article 5 of the Amendments to the Constitution of the United States in this that to permit its competitors to enjoy the privilege of holding the total movement to their lines by the use of "cut-back" rates while at the same time denying the plaintiff the right to charge equal rates, thereby giving to its competitors unequal advantage, the Commission has confiscated in an irreparable manner the property rights of the plaintiff, and has given an undue preference to the trunk line competitors, and the decision of the Commission, as stated by Commissioner Splawn in his dissent "violates all principles of justness and fairness" in that it precludes the plaintiff from participating in the outbound movement of cottonseed products and in the through movement of the traffic on cottonseed and cottonseed products from common origins on an equality of rates with the competing trunkline railroads, thereby depriving the Plaintiff of its property in violation of the provisions of the Fifth Amendment.

7. That if said order of January 3, 1942, effective April 28, 1942, is permitted to go into effect, then the plaintiff will suffer immediate and irreparable damage for which it has no plain, adequate, complete, effective, and efficient remedy at law, and that injunctive relief is the only effective and adequate remedy that will fully protect the Plaintiff:

Wherefore, premises considered, Plaintiff prays that upon the filing of this petition, and in accord with Title 28, Sec. 47 of the U. S. Code, a Three-Judge Court be assembled and a hearing be had at the earliest possible date to the end that irreparable damage may be prevented; that notice hereof be served upon the United States of America upon the Interstate Commerce Commission, upon the Illinois Central Railroad Company, and upon the St. Louis & San Francisco Railroad Company (J. M. Kurn and John G. Lonsdale, Trustees) in the manner and for the time

6 required by law, and that all necessary writs and process issue therefor commanding the Defendants upon a certain date to appear and plead hereto, by the granting of the relief prayed; that the Court temporarily stay and suspend the enforcement, operation, and execution of the order entered in said Docket No. 28,590; that an interlocutory and temporary restraining order



suspending and restraining the operation, enforcement, and execution of said order be issued, and that upon final hearing that this court permanently enjoin, suspend, set aside, and annul the said order of the Interstate Commerce Commission in Cause No. 28,590 of January 3, 1942, effective April 28, 1942; that this court take such other order or orders and grant to the Plaintiff such other, further, special, and general relief as in equity and good conscience plaintiff is entitled to have and receive; and as it will ever pray, etc.

Respectfully,

COLUMBUS AND GREENVILLE RAILWAY COMPANY,  
By (s) R. C. STOVALL,  
*President and General Counsel.*  
(s) FORREST B. JACKSON,  
*Of Counsel.*

[Duly sworn to by Forrest B. Jackson; jurat omitted in printing.]

7 *Exhibit A to complaint*

## INTERSTATE COMMERCE COMMISSION

No. 28590

COTTONSEED ALLOWANCES OF COLUMBUS & GREENVILLE RY. CO.

Submitted November 12, 1941.—Decided January 3, 1942

Refunds through claim channels by the Columbus & Greenville Railway Company to shippers who use its line for the out-bound movement of cottonseed products, manufactured from cottonseed moving into mill points by lines of other rail carriers, found unlawful. Schedules providing for the refund, or cut-back, ordered canceled. Former report, 238, I. C. C. 309.

R. C. Stovall and Forrest B. Jackson for respondent.

M. G. Roberts, William W. Dalton, Harold E. Spencer, Nathan S. Sherman, and Alvin J. Bauman for interveners.

### REPORT OF THE COMMISSION

MAHAFFIE, Commissioner:

After report, order, and citation<sup>1</sup> of division 3 in Investigation and Suspension Docket No. 4599, Allowances on Cottonseed at

<sup>1</sup> The order of division 3 cited respondent to show cause by formal return why its tariff No. 9-B, I. C. C. No. 81, should not be amended so as to eliminate provisions contained therein under which respondent agrees to make refunds to shippers of out-bound traffic from the mill point in instance where the in-bound traffic has moved over the line of a carrier other than respondent.



C. & G. Ry. Points, 238 I. C. C. 309, this investigation was instituted upon our own motion into and concerning the lawfulness of the rates, charges, rules, regulations and practices, published in Columbus & Greenville Railway Company's freight tariff No. 9-B, I. C. C. No. 81, providing refunds, sometimes called "cut-back," to shippers of out-bound cottonseed products from manufacturing or mill points on its line in instances where the in-bound shipments of cottonseed moved into the mill points over the lines of other rail carriers. Exceptions to the proposed report of the examiner were filed by respondent, replies thereto were made by interveners and the issues have been orally argued.

8 In the former proceeding, division 3 found unlawful respondent's freight tariff No. 9-C, I. C. C. No. 83, providing substantially the same refund or cut-back as published in tariff I. C. C. No. 81, which proposed to supersede and cancel the latter tariff. This investigation has afforded respondent a full hearing as to the lawfulness of tariff I. C. C. No. 81.

It was stipulated by the parties that the record and findings of fact in the prior proceeding, 238 I. C. C. 309, by reference, be made a part of the record herein, to be supplemented by any documentary evidence and oral testimony that the parties desired to present with the provision that the findings of fact in the prior report were not to be considered conclusive in this proceeding.

The principal difference between tariff I. C. C. No. 81, here in issue, and I. C. C. No. 83 ordered canceled by division 3 is in form, or choice of words used in the two publications. Tariff I. C. C. No. 81 does not use the term "allowances" but refers to "rates." There is no difference in substance and effect of the tariffs. Each of them provide a cut-back to the shipper of outbound cottonseed products from the mill point upon the surrender of inbound freight bills of other carriers for the transportation of cottonseed from origin to the mill point in settlement of claims.

Excerpts from tariff I. C. C. No. 81, which purports to publish rates and rules governing transit privileges on cottonseed, carloads, at Columbus, Greenville, Greenwood, Indianola, Moorhead, and West Point, Miss., are as follows:

"Item 5 (a) provides that the rates and rules published therein will apply on cottonseed, in carloads, from stations on the Columbus & Greenville Railway, or on cottonseed, in carloads, received from connecting lines at Columbus & Greenville Railway junction points with such lines to the named manufacturing or mill points for cracking, crushing, etc., and the subsequent shipment of the product, as described in Item 10, from such points via the Columbus & Greenville Railway.

9 "Item 5 (b) provides that the rates will also apply on cottonseed, in carloads, from stations on connecting lines



and moving via such lines to the above-mentioned manufacturing or mill points on the Columbus and Greenville Railway, when the products of cottonseed as described in Item 10 are subsequently shipped in carloads, or less than carload quantities, from such manufacturing or mill points via the Columbus & Greenville Railway.

"Item 5 (c) provides that the rates published in the tariff may not be used in waybilling shipments, and that all shipments must be waybilled at the full local or joint rates lawfully applicable to the manufacturing or mill point proper in effect on date of shipment from the point of origin.

"Item 5 (d) provides that upon evidence of the shipment of the product, in carloads, or less than carload quantities, over the Columbus & Greenville Railway at full published tariff rates applying from the manufacturing or mill point, the freight charges on cottonseed to the manufacturing or mill point will be reduced to the basis of rates shown in Item 40 through freight claim channels.

"Item 40 sets forth a mileage scale of rates designated to apply on cottonseed, carloads, minimum 30,000 pounds. The rates in this item are applied on the basis that for every 100 pounds of weight represented by in-bound freight bills on cottonseed, surrendered for refund, there must be furnished evidence of shipment from the manufacturing or mill point of 93 pounds of cottonseed products. When in-bound bills are surrendered at this ratio, the rates in Item 40 are applied to 93 percent of the weight of the cottonseed.

"Item 25 provides that in the event changes are made in the rates and rules published in this tariff after the cottonseed is shipped from point of origin, the rates and rules in effect on date of the shipment from point of origin or mill point will apply."

Briefly stated, the justification offered by respondent for its tariff I. C. C. No. 81 is that the tariff is primarily a local tariff publishing rates and rules governing transit privileges on cottonseed, in carloads, at mill points on its line; that the tariff applies locally from all points on its railroad to all mill points located thereon; that the transit privilege incorporated in the tariff by adjustment through claim channels, equalizes the net charge to the shipper for the total haul of the cottonseed and products thereof with charges resulting from the application of cut-back rates in tariffs of the connecting lines, including the protestants, at common mill points; that tariff I. C. C. No. 81 grants a privilege at the expense of respondent, and that the privilege is granted solely for the purpose of equalizing the net transportation cost to the shipper of the product from mill point to destination.



tion; that the tariff publishes no rates for application on the in-bound movements; that the rates for the in-bound movements of cottonseed are published in tariffs, local or joint, governing the movement to the mill point; likewise, the rates on cottonseed products from the mill point are published in tariffs, local or joint, governing the movement from the mill point; that the tariff here in issue is only a means to equalize the rates applicable to the movement of cottonseed to mill points therein named and the movement of the products manufactured therefrom to destinations over routes of respondent and its connecting lines with the rates over the routes of competing carriers; and that the resultant rates under the tariff here in issue on the movement of the seed to the mill, the movement of the product therefrom, or the aggregate of both, are identical with those available over competing carriers.

The following excerpt from the record illustrates the application of the tariff:

"\* \* \* Take a shipment of cottonseed from Coahoma, Miss., a point on the Y. & M. V. Railroad, to Greenville, a distance of 87 miles. On the initial movement to Greenville the rate is 8.4 cents per 100 pounds. That rate is assessed and collected when the seed moves to Greenville. It is not the rate published in respondent's cut-back tariff, nor in the cut-back tariff of the Y. & M. V. Railroad. It is, however, the local rate of the Y. & M. V. Railroad as published in its tariff lawfully on file with the Interstate Commerce Commission. When the cottonseed oil is reshipped by the Columbus & Greenville Railway, a rate of 48 cents per 100 pounds, which is the full joint rate by way of the respondent and its connections from Greenville to Cincinnati, is assessed and collected and subsequently, and within 15 months from the date of issue of the bill of lading, the shipper files his claim for the privileges granted under the tariff in question (I. C. C. No. 81). This respondent will refund the shipper to basis of rate set forth in its tariff for 87 miles, or 7 cents. \* \* \* The net cost would be, then, 7 cents to Greenville, plus 48 cents beyond, or a total of 55 cents per 100 pounds.

"Q. Mr. Hawkins, assuming that the product from the seed in the example given had moved from the mill point, Greenville, Miss., to Cincinnati, Ohio, by way of the Y. & M. V. Railroad, a connecting and competing carrier at that point with the C. & G., what would have been the net cost to the shipper for the through movement?

"A. The net cost would have been exactly the same. The mechanics of the tariff would have been the same. This is, that line would have assessed a rate of 8.4 cents on the initial movement; then upon reshipment that line would have assessed the same rate, that is, 48 cents; then subsequently, and



within 15 months, it would have, upon presentation of claim, re-adjusted through claim channel the charges to the basis that would apply if the shipment moved over respondent's line. In other words, the net cost to the shipper is the same, however it moves.

"Q. Now, on your illustration there from Coahoma to Greenville . . . what carrier would collect the local rate?

"A. The Y. & M. V. Railroad.

"Q. And if that shipment were moved from Greenville, or the products of the seed shipped from Greenville to Memphis via the Columbus & Greenville Railroad, how would the charges be refunded by the Columbus & Greenville?

"A. Just like they are by the Y. & M. V., upon evidence of re-shipment and upon presentation of claim we would refund the shipper the difference between the 8.4 cent rate from Coahoma to Greenville and the cut-back rate of 7 cents, or 1.4 cents, which would allow the Y. & M. V. its full local rate into Greenville and, additionally, will allow them full representation and participation in the movement from Greenville to Memphis, the illustration you used.

"Q. Now as I understand it, the Y. & M. V. are paid their full local. If the shipment moves from Greenville by the Y. & M. V. they reduce their local rate down to the cut-back, and their tariff similar to the C. & G. tariff, do they not?

"A. You can call it anything you want to. They refund the shipper the difference between 8.4 cents paid to the mill point and a fictional rate of 7 cents.

"Q. What do you mean by a fictional rate?

"A. I mean it has no application other than a basis for refunding the inbound rate to a lower basis."

Respondent is not a party to the inbound rates on cottonseed from points on the lines of its connecting rail carriers to the named mill points on its line, and no other carrier is a party to its tariff I. C. C. No. 81. The refunds, or cut-back, are exactly the same in amount as those of the other carriers serving the mill points. The difference between the practice of respondent and those of the other carriers is that it makes an allowance on seed that does not originate on its own line, and absorbs the allowances so made out of its proportion of the outbound rates to which it is a party. The purpose of making the refund is to enable it to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating lines hold themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move the outbound products over their lines. If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's tariff as the inbound



shipments move from origin points to the mills at the local rates, under separate bills of lading.

12 The reason given by respondent for the opposition to its cut-back tariff by interveners is that it will interfere with their practice of recapturing the outbound traffic from the mill points by means of their cut-back rates on the inbound cottonseed. Respondent contends that it has the right to offer the same concession as interveners, on the ground that the inbound carrier of the cottonseed to the mill point has no inherent or vested right to the outbound haul of the products manufactured from the seed, citing *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768. The court, among other things, said:

"This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. \* \* \* There is no rule of law or practice which gives a carrier the right to recapture traffic which it originated."

Interveners emphasize a distinction in that the tariff of respondent attempts to name rates for account of their lines without their concurrence, whereas their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point. The legality of interveners' tariffs is not in issue; however, this is an important difference between the application of the respective tariffs. On the question of equality of the rates raised in the former proceeding, division 3 said:

"Instead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier."

Section 6 of the Interstate Commerce Act provides that every common carrier shall publish tariffs showing the charges for transportation between different points on its own line and between points on its own line and points on the line of any other carrier. Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4) of the act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the act.

Respondent provides the same cut-back for cottonseed originating on its line which it brings into the mill points as do the



other carriers serving those points. No objection is made to that practice. Respondent originates some 15 or 20 percent of the cottonseed milled at the junction points. Some 50 percent of the inbound seed is brought into the mill points by truck. This leaves some 30 or 35 percent of the total traffic possibly subject to respondent's cut-back on traffic originating on other lines. No provision is made for refund to shippers on that portion of the traffic brought into the mill points by truck. Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute.

We find that to the extent respondent's tariff I. C. C. No. 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act.

An appropriate order will be entered.

SRLAWN, Commissioner, Dissenting:

Respondent's tariff accomplishes, by a so-called refund provision an equalization of its outbound rates with those of its intervening trunk-line competitors. This tariff provision in no wise affects the amount of the rates paid for the inbound service to the mill point. Its only effect is to reduce the outbound rate and thus make applicable the same rate as applies when the outbound haul is performed entirely by the trunk lines.

The outbound traffic is "free" traffic in the sense that that term was applied to the grain by the Supreme Court in *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768. In other words, it is

14 traffic which has previously moved in on local or joint rates to the milling point and has there come to rest. Hence the fact that "respondent is not a party to the inbound rates on cottonseed \* \* \* to the named mill points" is without legal significance.

This report also relies on two additional facts. These are that no other carrier is a party to respondent's tariff containing the provision in question and that respondent absorbs the allowances made out of its proportion of the out-bound rate to which it is a party. The identical facts are true of the tariffs and practice of at least one of the intervening trunk lines.

The report concludes that if it were not for those tariffs there would be no necessity for respondent's tariff, but dismisses the matter by stating that "the legality of interveners' tariffs is not in issue."

Certainly there can be no doubt that the provision is lawful as to outbound traffic to points reached by respondent over its line



and counsel for the trunk lines agrees that it is. But even here the report makes no distinction in its sweeping condemnation of respondent's tariff.

The report finds that refunding of a portion of the published rate of respondent "is a practice made unlawful by section 1 (6)." That section does not declare unlawful the so-called practice but condemns "unjust and unreasonable practices \* \* \* affecting rates \* \* \*." No finding of unreasonableness is made in this connection. Nor does the report indicate wherein the provision in issue violates section 6 (1) and (4).

The effect of the decision violates all principles of justness and fairness as it precludes respondent from participating in the out-bound movement or in the through movement of the traffic from common origins on an equality of rates with the trunk lines.

Commissioner ROGERS was necessarily absent and did not participate in the disposition of this proceeding.

15

## ORDER

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 3rd day of January, A. D. 1942.

No. 28590

## COTTONSEED ALLOWANCES OF COLUMBUS &amp; GREENVILLE RY. CO.

It appearing, That by order dated November 15, 1940, the Commission, upon its own motion, entered upon an investigation into and concerning the lawfulness of the rates, charges, rules, regulations and practices, as published in Columbus and Greenville Railway Company's Freight Tariff No. 9-B, I. C. C. No. 81;

It further appearing, That full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and has found said tariff unlawful to the extent it provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers:

It is ordered, That respondent be, and it is hereby, notified and required to cancel such unlawful provisions of said tariff on or before February 26, 1942, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act.

By the Commission.

[SEAL]

W. P. BARTEL, *Secretary.*



16

*Exhibit "B." to complaint*

## ORDER

## INTERSTATE COMMERCE COMMISSION

No. 28590

## COTTONSEED ALLOWANCES OF COLUMBUS &amp; GREENVILLE RY. CO.

In the Matter of Respondent's Request for Postponement of the  
Effective Date of the Order

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of request of respondents for postponement of the effective date of the order:

It is ordered, That the order entered in the above-entitled proceeding on January 3, 1942, which was by its terms made effective on February 26, 1942, upon not less than one day's notice, be, and it is hereby, modified to become effective on April 28, 1942, instead of February 26, 1942.

Dated at Washington, D. C., on the 13th day of February 1942.  
By the Commission, Commissioner Mahaffie.

[SEAL]

W. P. BARTEL, *Secretary.*

16a

*Exhibit C to complaint*

No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff, unless otherwise specifically authorized by the Commission. I. C. C. No. 81 (Cancels I. C. C. No. 74).

## COLUMBUS AND GREENVILLE RAILWAY COMPANY

## FREIGHT TARIFF No. 9-B (CANCELS FREIGHT TARIFF No. 9-A)

Local Tariff Publishing Rates and Rules Governing Transit Privileges on Cottonseed, Carloads at Columbus, Miss.; Greenville, Miss.; Greenwood, Miss.; Indianola, Miss.; Moorhead, Miss.; West Point, Miss.

## CLASSIFICATION

Governed, except as otherwise provided herein, by the Southern Classification No. 55, Agent E. H. Dulaney's I. C. C. No. 71, and by supplements to or successive issues of said publication. Issued September 18, 1938. Effective October 16, 1938. Expires with March 31, 1939, unless sooner cancelled, changed or extended.



Issued by Z. P. Hawkins, Asst. Traffic Manager. N. V. Hutchinson, Traffic Manager. 1304 Main Street, Columbus, Miss. Station Tariff File No. 35. Authority File No. 2777-3.

#### EFFECTIVE DATE

The rates and rules published in this Tariff apply only on shipments leaving point of origin on and after the effective date of this Tariff.

#### STATIONS FROM WHICH RATES APPLY

For list of stations from which rates published herein apply, see The Official List of Open and Prepay Stations No. 53, Agent F. A. Leland's I. C. C. No. A-18, supplements thereto or successive issues thereof.

#### RULES

##### Item 5—Application of Tariff

(a)<sup>1</sup> The rates and rules published in this tariff apply on Cottonseed, in carloads, from stations on the Columbus and Greenville Railway, or, on Cottonseed, in carloads, received from connecting lines at Columbus and Greenville Railway junction points with such lines to the following manufacturing or mill points on the Columbus and Greenville Railway: Columbus, Miss.; Greenville, Miss.; Greenwood, Miss.; Indianola, Miss.; Moorhead, Miss.; West Point, Miss.,<sup>2</sup> for cracking, crushing, delinting, or other manufacturing processes, and the subsequent shipment of the product, as described in Item 10, in carloads, or less than carload quantities, from such points via the Columbus and Greenville Railway.

(b)<sup>3</sup> The rates and rules published in this tariff will also apply on Cottonseed, in carloads, from stations on connecting lines, via such lines, to the following manufacturing or mill points on the Columbus and Greenville Railway: Columbus, Miss.; Greenville, Miss.; Greenwood, Miss.; Moorhead, Miss.; West Point, Miss., when the Product, as described in Item 10, is subsequently shipped in carloads, or less than carload quantities, from such points via the Columbus and Greenville Railway.

(c) The rates published in this tariff, must not be used in way-billing shipments. All shipments must be waybilled at full local or joint rates, lawfully applicable to manufacturing or mill point proper, in effect on date of shipment from point of origin.

(d) Upon evidence, as provided for herein, of shipment of the product, as described in Item 10, in carloads, or less than carload

<sup>1</sup> Denotes changes in wording which result in neither increase nor reduction in charges.

<sup>2</sup> Itta Bena, Miss., eliminated account mill removed.

<sup>3</sup> Denotes reduction.



quantities, via the Columbus and Greenville Railway at full published tariff rates applying from the manufacturing or mill point, the freight charges on cottonseed to the manufacturing or mill point will be reduced to the basis of rates shown in Item 40 herein, through Freight Claim Channels.

(e) For every 100 pounds of weight represented by inbound paid freight bills on cottonseed, surrendered for refund, there must be furnished evidence of shipment from the manufacturing or mill point of 93 pounds of cottonseed products, as described in Item 10. When inbound paid freight bills are surrendered at this ratio, the rates shown in Item 40 shall be applied to 93 per cent of the weight of the inbound cottonseed.

(f)\* In event there is a deficit between 93 per cent of actual weight of cottonseed and minimum weight of 30,000 pounds, such deficit shall be charged for on basis of carlead rate lawfully applicable on cottonseed when for disposition other than for manufacture and reshipment. In no case shall total charge be less than 30,000 pounds, figured at applicable rate shown in Item 40 herein.

#### Item 10—List of Outbound Cottonseed Products

Subject to the rules published herein the rates named in Item 50 are conditioned upon shipment of any of the following products of Cottonseed from the Manufacturing or Mill point.

Cottonseed cake or meal (including crushed or ground cake or screenings).

Cottonseed hull fibre or shavings (other than bleached or dyed).

Cottonseed hulls, not ground.

Cottonseed hulls, ground (Cottonseed Hull bran).

Cottonseed hull shavings pulp and cotton linters pulp.

Cotton linters or regins (other than bleached or dyed).

Cottonseed oil, liquid or solidified (Hydrogenated).

Cottonseed oil foots or sediment.

Cotton motes or Cotton sweepings (Cotton refuse from cottonseed oil mills).

Oil, Cooking and/or salad (made wholly of cottonseed oil).

Vegetable oil shortening in semi-solid form or plastic form (made wholly of cottonseed oil).

#### Item 15<sup>1</sup>—Method of Settlement

(a) Cottonseed intended for handling under this Tariff must be consigned locally to the manufacturing or mill point.

\* Denotes increase.



(b) Bills of Lading for the product, as described in Item 10, in carloads, or less than carload quantities, shipped from the manufacturing or mill points shall be issued by the Agent at such points at rates applicable on the outbound commodity from such point proper to final destination.

(c) The application of rates authorized herein on cottonseed, will be effected through Claim Channels, as provided in Item 35.

#### Item 20—Supervision and Inspection

Traffic handled at the rates and under the rules published in this Tariff shall be subject to the supervision of an inspector, or inspectors, who shall have access to the records of the Railroad and of the shippers for the purpose of determining the accuracy of the documents submitted in support of claims for protection of the rates shown in Item 40, herein. Among other duties it shall be the duty of the inspector to:

(a) Check, compare, and verify the inbound freight bills.

(b) Check the records of the Railroad and shippers for the purpose of determining the actual character and weight of outbound shipments, in order that the correctness of claims may be fully shown.

Supplement No. 4 contains all changes from the original tariff. Supplement No. 4 (Cancels Supplement No. 3) to I. C. C. No. 81.

### COLUMBUS AND GREENVILLE RAILWAY COMPANY

#### SUPPLEMENT NO. 5 (CANCELS SUPPLEMENT NO. 4) TO FREIGHT TARIFF NO. 9-B

Local Tariff Publishing Rates and Rules Governing Transit Privileges on Cottonseed, Carloads, at Columbus, Miss.; Greenville, Miss.; Greenwood, Miss.; Indianola, Miss.; Moorhead, Miss.; West Point, Miss.

#### CLASSIFICATION

Governed, except as otherwise provided herein, by the Southern Classification No. 57, Agent E. H. DuLaney's I. C. C. No. 84, and by supplements to or successive issues of said publication. Issued: January 30, 1941. Effective: March 7, 1941.

#### ELIMINATION OF EXPIRATION DATE

<sup>1</sup> The expiration date published on page 2 of Supplement No. 3 to I. C. C. No. 81 is hereby eliminated. All rates and provisions

<sup>1</sup> Denotes reduction.



of tariff are continued in effect until lawfully cancelled, changed, or amended.

Departure from the terms of Rule 9 (e) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission, No. 188390 of January 24, 1941. Issued by Z. P. Hawkins, Traffic Manager, 1304 Main Street, Columbus, Miss. Station Tariff File No. 35. Authority File No. 2777-3.

#### RULES

##### Item 25—Changes in Rates and Rules

In the event changes are made in the rates and rules published in this Tariff after the cottonseed is shipped from points of origin, the rates and rules in effect on date of shipment from point of origin to manufacturing or mill point will apply.

##### Item 30—Time Limit of Freight Bills

Shipments of manufactured product as described in Item 10, in carload, or less than carload quantities, must be made within one year from the date of paid freight bill covering inbound movement of Cottonseed.

##### Item 35<sup>1</sup>—Method of Handling Claims

(a) Claims for refunds of charges on the inbound movement of the cottonseed to the manufacturing or mill point to basis of the rates published in this tariff, must be filed by shipper within fifteen (15) months of the date of the outbound shipment from the manufacturing or mill point and supported by:

(1) The original paid freight bill or bills covering the inbound movement of the cottonseed.

(2) Copies of bills of lading covering outbound movement of the cottonseed or cottonseed product.

(3) A certificate in the following form signed by the shipper.

#### CLAIM CERTIFICATE

"Tender is hereby made to the Columbus and Greenville Railway Company of paid freight bills numbered and dated as shown below for the purpose of securing application of rates as provided in Columbus and Greenville Railway Company Freight Tariff No. 9-C on the commodity covered thereby. This tender is made in

<sup>1</sup> Denotes change in wording which results in neither increase nor reduction in charges.



good faith and with the specific guarantee on our part that such rates may legally be applied under the rules of said railroad as published in said tariff.

Paid freight bills Nos. \_\_\_\_\_ Dated \_\_\_\_\_ At \_\_\_\_\_  
 \_\_\_\_\_ (Signature of Shipper)"

#### VALIDITY OF PAID FREIGHT BILLS; RESHIPING CERTIFICATE

(b) In instances where shipper at manufacturing or mill point, for commercial reasons, forwards shipments from such manufacturing or mill points in the name of another party, firm, or corporation, the actual shipper must add to the above certificate the following:

"For commercial reason the shipment from \_\_\_\_\_ (Insert name of manufacturing or mill point), in car \_\_\_\_\_ (Insert car initials and number), shows consignor as \_\_\_\_\_ (Insert name of consignor as shown in bill of lading).  
 \_\_\_\_\_ (Signature of Shipper)"

#### Item 40<sup>2</sup>—Rates

For distances of (for distances, see Agent Roy Pope's Freight Tariff No. 201-A, I. C. C. No. 1798, supplements thereto or successive issues thereof)	Rates in cents per hundred pounds (cotton-seed car-loads, minimum 30,000 pounds)	For distances of (for distances, see Agent Roy Pope's Freight Tariff No. 201-A, I. C. C. No. 1798, supplements thereto or successive issues thereof)	Rates in cents per hundred pounds (cotton-seed car-loads, minimum 30,000 pounds)
5 miles and under	2½	75 miles and over 70	51½
10 miles and over 5	2½	80 miles and over 75	61½
15 miles and over 10	3½	85 miles and over 80	61½
20 miles and over 15	3½	90 miles and over 85	7
25 miles and over 20	3½	95 miles and over 90	7
30 miles and over 25	4½	100 miles and over 95	7
35 miles and over 30	4½	110 miles and over 100	7½
40 miles and over 35	4½	120 miles and over 110	7½
45 miles and over 40	4½	130 miles and over 120	7½
50 miles and over 45	5½	140 miles and over 130	8
55 miles and over 50	5½	150 miles and over 140	8
60 miles and over 55	6	160 miles and over 150	8½
65 miles and over 60	6	170 miles and over 160	8½
70 miles and over 65	6		

<sup>2</sup> No change in rates.

No supplement to this tariff will be issued, except for the purpose of cancelling the tariff, unless otherwise specifically authorized by the Commission. I. C. C. No. 10845 cancels I. C. C. No. 10743.



## FRISCO LINES

(J. M. Kurn and John G. Lonsdale, Trustees)

## ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

FREIGHT TARIFF No. 5162-T CANCELS FREIGHT TARIFF No. 5162-S

Of Rates in Cents Per 100 Pounds Applying on Cottonseed, Carloads for Application Locally Between Stations on St. Louis-San Francisco Railway Company in Alabama, Florida, Mississippi, and Tennessee When for Cracking, Crushing, Delinting, or Other Manufacturing Processes and Reshipment via St. Louis-San Francisco Railway Company

Governed, except as otherwise provided herein, by the Southern Classification No. 55, Agent E. H. Dulaney's I. C. C. No. 71, and by supplements to or successive issues of said publication. Issued February 20, 1939. Effective March 30, 1939. Issued by J. M. Strupper, Assistant Freight Traffic Manager, 906 Olive Street, St. Louis, Mo.

## GENERAL APPLICATION OF RATES

## Item 5—Application of Tariff

(a) The rates and rules as authorized herein apply on cottonseed in carloads to and from stations on the St. Louis-San Francisco Railway Company in Alabama, Florida, Mississippi, and Tennessee via the St. Louis-San Francisco Railway Company from origin to manufacturing or mill points for cracking, crushing, delinting, or other manufacturing processes, and the subsequent shipment of the product, viz: cottonseed oil, cottonseed oil soap stock, cottonseed oil foots or sediment, crude cottonseed oil tank bottoms, cottonseed cake, cottonseed meal, cottonseed hull fibre or shavings, other than bleached or dyed, cottonseed hulls, cotton linters, cotton linter pulp, cottonseed hull fibre shavings pulp, cottonseed oil mill motes, cottonseed oil (cooking)<sup>1</sup> or lard substitutes (made wholly of cottonseed oil),<sup>1</sup> carloads or less carloads, from the manufacturing or mill point via the St. Louis-San Francisco Railway Company.

(b) The rates shown herein must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates applicable to manufacturing or mill point proper, in effect on the date of shipment from point of origin, and freight charges will be collected by the agent at such rates upon delivery.



(c) Upon evidence, as provided for herein, of shipments of products of cottonseed, viz: cottonseed oil, cottonseed oil soap stock, cottonseed oil foots or sediment, crude cottonseed oil tank bottoms, cottonseed cake, cottonseed meal, cottonseed hull fibre or shavings, other than bleached or dyed, cottonseed hulls, cotton linters, cotton linter pulp, cottonseed hull fibre shavings pulp, cottonseed oil mill motes, cottonseed oil (cooking)<sup>1</sup> or lard substitutes (made wholly of cottonseed oil),<sup>2</sup> carloads or less carloads, via St. Louis-San Francisco Railway Company, at full published tariff rates applying from the manufacturing or mill point, the freight charges on cottonseed to the manufacturing or mill point will be reduced to the basis of rates shown herein through the Freight Claim Department on basis of ratio of 100 pounds of cottonseed inbound for each 93 pounds of product outbound.

**Item 10.<sup>3</sup>—Alternative Application of Class Rates With Commodity Rates Named Herein on Cottonseed and Cottonseed Products**

If the charges accruing under the class rates published in the following tariffs, including supplements to or successive issues thereof, from and to the same points via the same routes, are lower than the charges accruing under the commodity rates published in this tariff on cottonseed and cottonseed products, the lower charges resulting from such class rates will apply.

Agent	Territory	Tariff	I. C. C. No.
F. D. Miller	Alabama	710-A	221
F. D. Miller	Mississippi	714-A	222
F. D. Miller	Tennessee	717-A	217

**Item 15—Certificate to Be Attached to Claims**

Claims must be accompanied by certificate in following form:  
 "Tender is hereby made to the St. Louis-San Francisco Railway Company of paid freight bills numbered and dated as specified below for the purpose of securing application of rates as provided in St. Louis-San Francisco Railway Company Tariff No. 5162-T, I. C. C. No. 10845, on the commodity covered thereby. This tender is made in good faith and with the specific guarantee on our part that such rates may legally be applied under the rules of said rail-

<sup>1</sup> Applicable only at Memphis, Tenn.

<sup>2</sup> Applicable only on interstate traffic.



roads, as published in their Tariff No. 5162-T, I. C. C. No. 10845, effective March 30, 1939.

Paid Freight Bills \_\_\_\_\_ Pro. No. \_\_\_\_\_ Date \_\_\_\_\_  
Manufacturing Point \_\_\_\_\_

\_\_\_\_\_  
(Signature of Claimant)"

### Item 20—Changes in Rates and Rules

In the event changes are made in rates and rules published herein after the cottonseed is shipped from points of origin, the rates and rules in effect on date of shipment from points of origin will apply, except as otherwise provided in Item 70.

### Item 25—Change of Ownership of Cottonseed

The transfer by mills of paid freight bills covering cottonseed will be permitted only where the commodity is also transferred by bona fide sale. A certificate to this effect shall be made in the following form on the face of the freight bill:

"This is to certify that there has been a bona fide sale to the undersigned of the commodity covered by this freight bill.

(Signed) \_\_\_\_\_  
(Dated) \_\_\_\_\_"

### Item 30—Credit Slips

Where the outbound shipment from manufacturing point does not equal in pounds the weight represented by the inbound freight bill covering the seed, and which is offered for cancellation, a credit tonnage slip shall be given shipper by carrier for such difference, less the deduction for the loss, and such tonnage slip will be accepted on future shipments by the carrier the same as freight bills on which privileges authorized herein have been accorded.

The credit tonnage slips must give full reference to the cancelled freight bill, by waybill number, car number and initials, point of origin and rate collected to the manufacturing point.

### Item 35—List of Stations Showing Facilities, Billing Instructions, et Cetera

Governed by Official List of Open and Prepay Stations No. 53, Agent F. A. Leland's I. C. C. No. A-18, supplements thereto or successive issues thereof, as to prepay requirements, changes in names of stations, additions and abandonment of stations, billing instructions from or to points not on railroads, restrictions as to

\* Not applicable on Alabama intrastate traffic.



nonacceptance or nondelivery of freight and changes in station facilities, except as otherwise shown herein.

#### Item 40—Marked Capacity and Dimensions of Cars

For marked capacities and dimensions of cars to be used in the establishment of minimum weights on commodities based thereon, see *Official Railway Equipment Register*, Agent G. P. Conard's I. C. C.-R. E. R. No. 250.

#### Item 45—Method of Settlement

(a) Cottonseed intended for handling under this tariff must be consigned locally to the manufacturing or mill point.

(b) Bills of lading for the products, viz: cottonseed oil, cottonseed oil soap stock, cotton seed oil foots or sediment, crude cottonseed oil tank bottoms, cottonseed cake, cottonseed meal, cottonseed hull fibre or shavings, other than bleached or dyed, cottonseed hulls, cotton linters, cotton linter pulp, cottonseed hull fibre shavings pulp, cottonseed oil mill motes, cottonseed oil (cooking)<sup>1</sup> or lard substitutes (made wholly of cottonseed oil),<sup>1</sup> carloads or less carloads, shipped from the manufacturing or mill point, shall be issued by the agent at such point at rates applicable on outbound commodities from such point proper to final destination.

(c) The application of the rates on cottonseed, inbound, as authorized herein will be effected by claim. Claim must be supported with copies of the outbound bills of lading from the manufacturing or mill point, together with statements showing movement of the cottonseed on which rates are applicable inbound and shipments of the outbound product from the manufacturing or mill point, such claims to be tendered to the local agent of the St. Louis-San Francisco Railway Company, who will attach copy of outbound waybills from the manufacturing or mill point, together with the original inbound paid freight bill and reshipping certificate prescribed in Item 15.

#### Item 50—Reference to Items, Tariff, Circulars, or Classification

Where reference is made to an item, tariff, circular, or classification, such reference will embrace supplements to or successive issues, as the case may be, of such publication.

#### Item 55—Shipments From Connecting Lines

The rates shown herein also apply from junctions of the St. Louis-San Francisco Railway Company with connecting lines on

<sup>1</sup> Applicable only at Memphis, Tenn.



shipments originating at points on connecting lines from which no through net rates are published, subject to the rules herein.

#### Item 60—Supervision and Inspection

The traffic handled at the rates and under the rules shown in this tariff shall be subject to the supervision of an inspector or inspectors, who shall have access to the records of the railroads and of the shippers for the purpose of determining the accuracy of the documents submitted in support of claims for protection of the rates shown herein.

Among other duties, it shall be the duty of the inspector to:

- (a) Check, compare, and verify the inbound road's freight bills.
- (b) Check the records of the railroads and shippers for the purpose of determining the actual character and weight of the outbound shipments, in order that the correctness of the claims may be fully shown.

#### Item 65<sup>2</sup>—Terminal or Transit Privileges or Services

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules, and regulations as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission, for terminal or transit privileges or services, including also:

Car Rental, Car Service, Cartage, Demurrage, Diversion, Elevation, Heater Service, Icing, Lighterage, Loading, Private Car Mileage, Reconsignment, Refrigeration, Stop-off, Storage, Switching, Transfer, Transit Privileges, Unloading, Weighing.

#### Item 70—Time Limit of Freight Bills

Shipments of manufactured product, viz: cottonseed oil, cottonseed oil soap stock, cottonseed oil foots or sediment, crude cottonseed oil tank bottoms, cottonseed cake, cottonseed meal, cottonseed hull fibre or shavings, other than bleached or dyed, cottonseed hulls, cotton linters, cotton linter pulp, cottonseed hull fibre shavings pulp, cottonseed oil mill motes, cottonseed oil (cooking)<sup>1</sup> or lard substitutes (made wholly of cottonseed oil),<sup>1</sup> carloads or less carloads, must be made within one year from the date of paid freight bill covering inbound movement of cottonseed.

<sup>1</sup> Applicable only at Memphis, Tenn.

<sup>2</sup> Denotes change in wording which results in neither increase nor reduction in charges.



## Item 75—Validity of Paid Freight Bills, Reshipping Certificate

In instances where the shipper at the transit point, for commercial reasons, forwards shipment from the transit point in the name of another party, firm, or corporation, the actual transit shipper must add to the reshipping certificate quoted above, the following:

"For commercial reasons, the shipment from \_\_\_\_\_ (insert name of transit point), in car \_\_\_\_\_ (insert car initial and number), shows consignor as follows:

-----  
(Signature of Shipper)"

*Rates Applying on Cottonseed, Carloads*

[Minimum weight 30,000 pounds—see Items 5 to 75, inclusive]

Distance (see note)	Rate	Distance (see note)	Rate
10 miles and under	3 $\frac{3}{4}$	130 miles and over 110	7 $\frac{1}{2}$
15 miles and over 10	3 $\frac{1}{4}$	130 miles and over 120	7 $\frac{1}{2}$
20 miles and over 15	3 $\frac{1}{4}$	140 miles and over 130	8
25 miles and over 20	3 $\frac{1}{4}$	150 miles and over 140	8
30 miles and over 25	4 $\frac{1}{4}$	160 miles and over 150	8 $\frac{1}{4}$
35 miles and over 30	4 $\frac{1}{4}$	170 miles and over 160	8 $\frac{1}{4}$
40 miles and over 35	4 $\frac{1}{4}$	180 miles and over 170	9
45 miles and over 40	4 $\frac{1}{4}$	190 miles and over 180	9
50 miles and over 45	5 $\frac{1}{4}$	200 miles and over 190	9 $\frac{1}{4}$
55 miles and over 50	5 $\frac{1}{4}$	210 miles and over 200	9 $\frac{1}{4}$
60 miles and over 55	6	220 miles and over 210	10
65 miles and over 60	6	250 miles and over 230	10
70 miles and over 65	6	260 miles and over 250	11
75 miles and over 70	6 $\frac{1}{4}$	280 miles and over 260	12
80 miles and over 75	6 $\frac{1}{4}$	300 miles and over 280	12
85 miles and over 80	6 $\frac{1}{4}$	320 miles and over 300	13
90 miles and over 85	7	340 miles and over 320	13
95 miles and over 90	7	360 miles and over 340	14
100 miles and over 95	7	380 miles and over 360	14
110 miles and over 100	7 $\frac{1}{4}$	400 miles and over 380	15

\* Applicable only on interstate traffic.

NOTE.—For distances to be used in connection with this tariff, see St. Louis-San Francisco Railway Freight Tarif No. 1239-F, I. C. C. No. 10114.

16c

*Exhibit E to complaint*

Ill. C. C. No. A-1503. (Cancels Ill. C. C. No. A-1413). I. C. C. No. 8206 (Cancels I. C. C. No. 8067).

## ILLINOIS CENTRAL RAILROAD COMPANY

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY IN  
CONNECTION WITH PARTICIPATING CARRIERS SHOWN HEREIN

2912-Q (Cancels 2912-P)

Local and Joint Freight Tariff Publishing Rates, Rules and Regulations Applying on Cottonseed, Carloads, Minimum Weight 30,000 Pounds for Single and Joint Line Application Between



Stations on Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Gulf and Ship Island Railroad, and Connecting Lines Also Between Stations on Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Gulf & Ship Island Railroad, and Connecting Lines, When for Cracking, Crushing, Delinting, or Other Manufacturing Process and Reshipment, Also Distance or Mileage Rates as Shown on Page 6, Section No. 1 and Page 10, Section No. 2.

## CLASSIFICATION

Governed, except as otherwise provided herein, by the Southern Classification No. 55, Agent E. H. Dulaney's I. C. C. No. 71, and by supplements to or successive issues of said publication. Issued July 21, 1938. Effective September 1, 1938. (Published to meet Motor Truck Competition and will expire with September 30, 1938, unless sooner cancelled, changed, or extended). Issued by R. A. Trovillion, General Freight Agent, 135 East Eleventh Place, Chicago, Ill. F. H. Law, General Traffic Manager, Chicago, Ill. William Haywood, Freight Traffic Manager, Chicago, Ill.

*Participating carriers*

Name of carrier	Concurrence		
	PX	I. C. R. R. No.	The Y. and M. V. R. R. No.
Canton & Carthage Railroad Company	5	1	3
Fernwood, Columbia & Gulf Railroad Company	5	3	16
Gulf, Mobile and Northern Railroad Company	2	337	337
Gulf and Ship Island Railroad Company	5	A-3	A-4
Mississippi Central Railroad Company	5	2	14
Mississippi & Skuna Valley Railroad Company	5	1	2
Mobile and Ohio Rail Road Company (C. E. Ervin and T. M. Stevens, Receivers)	3	60	
Northern Alabama Railway Company	3	2462	2461
St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees)	5	49	
Southern Railway Company	3	2462	2461



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Supplement No. 12 to Ill. C. C. No. A-1503 (Cancels Supplement No. 11). Supplement No. 12 to I. C. C. No. 8206 (Cancels Supplement No. 11). (Supplement No. 12 contains all changes from original tariff effective on date hereof.)

## ILLINOIS CENTRAL RAILROAD COMPANY

## THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY IN CONNECTION WITH PARTICIPATING CARRIERS SHOWN IN TARIFF

Supplement No. 12 (Cancels Supplement No. 11). (Supplements Nos. 1-A,<sup>1</sup> 11-A,<sup>1</sup> and 12 contain all changes from original tariff effective on date hereof) to 2912-Q.

Local and Joint Freight Tariff Publishing Rates, Rules and Regulations Applying on Cottonseed, Carloads. Minimum Weight 30,000 Pounds, for Single and Joint Line Application Between Stations on Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Gulf and Ship Island Railroad, and Connecting Lines; also Between Stations on Illinois Central

<sup>1</sup> Intrastate.



Railroad, The Yazoo and Mississippi Valley Railroad, Gulf & Ship Island Railroad and Connecting Lines, when for Cracking, Crushing, Delinting or Other Manufacturing Process and Reshipment; also Distance or Mileage Rates as shown on Page 6 of Tariff, Section No. 1 and Page 10 of Tariff, Section No. 2; also Distance or Mileage Rates Applying on Soya Beans, Carload, Between Stations on Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, and Gulf and Ship Island Railroad, as Shown in Section No. 3 Herein

#### CLASSIFICATION

Governed, except as otherwise provided herein, by the Southern Classification No. 57, Agent E. H. Dulaney's I. C. C. No. 84, and by supplements to or successive issues of said publication. Issued October 23, 1941. Effective November 27, 1941 (except as otherwise provided herein). Published to meet Motor Truck Competition. Except as otherwise provided, rates published in Tariff, as amended, expire with December 31, 1941, unless sooner cancelled, changed or extended. Issued by W. L. Reeves, General Freight Agent, 135 East Eleventh Place, Chicago, Ill. J. L. Sheppard, Freight Traffic Manager, Chicago, Ill. R. A. Trovillion, Assistant Freight Traffic Manager, Chicago, Ill.

#### Participating Carriers<sup>1</sup>

List of Participating Carriers is as shown in Tariff, except as shown below.

Name of carrier	Concurrence		
	PX	I. C. R. R. No.	The Y. and M. V. R. R. No.
Mobile and Ohio Rail Road Company (C. E. Ervin and T. M. Stevens, Receivers)	(1)	(1)	
Northern Alabama Railway Company	(1)	(1)	(1)
St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees)	(1)	(1)	
Southern Railway Company (EL-658)	(1)	(1)	(1)

<sup>1</sup> Cancel account no application.

#### General Change<sup>2</sup>

Refer to Tariff and correct Title Page to read:

Published to meet Motor Truck Competition and will expire with December 31, 1941, unless sooner cancelled, changed, or extended.

<sup>1</sup> Reissued from Supplement No. 4, effective March 22, 1939.

<sup>2</sup> Reissued from Supplement No. 10, effective December 26, 1940.

For Explanation of Route Nos., see page 12 of tariff.



General Change<sup>2</sup>

The suspension of Rule No. 30, on page 9, and the expiration date of September 30, 1938, on the title page, insofar as it affects Rule No. 30 of I. C. C. No. 8206, Ill. C. C. No. A-1508, Tariff No. 2912-Q, is hereby vacated and set aside as of March 30, 1939, on and after which date provisions of Supplement No. 5 will apply.

Cancels corresponding provisions on page 4 of Tariff, as amended.

(BC-661-661)

Application of Tariff—List of Stations to and from which Distance Rates Shown in Section No. 1 Apply

The distance rates provided in Section No. 1 apply between stations on the following railroads for Single or Joint line hauls over such railroads:

Illinois Central Railroad (Southern Lines), except as provided in Note "C" below.

The Yazoo and Mississippi Valley Railroad (except stations in Louisiana on the Shreveport District west of Mississippi River).

Gulf and Ship Island Railroad.

as shown in:

I. C. R. R. Tariff 36-E, I. C. C. No. 7614 (see Exceptions in Note "C" below).

The Y. and M. V. R. R. Tariff 30-D, I. C. C. No. 8258 (except stations in Louisiana on the Shreveport District west of Mississippi River).

G. & S. I. R. R. Tariff 34-E, I. C. C. No. 1194.

Note C.—The provisions of Section No. 1 apply between stations on the Birmingham District of the Illinois Central Railroad only as follows:

(a) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive.

(b) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive.

and

Birmingham, Ala., and points in the Birmingham, Ala., Switching District.

(c) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive; also Birmingham, Ala., and points in the Birmingham, Ala., Switching District, except points on Bessemer Branch.

and

Stations on Illinois Central Railroad other than Birmingham District, Corinth, Miss., to Birmingham, Ala., inclusive.

<sup>2</sup> Reissued from Supplement No. 5, effective March 30, 1939.



**List of Stations to and From Which Distance Rates Shown in  
Section No. 2 Apply**

The distance rates provided in Section No. 2 apply from, to and between stations on the following railroads for single and joint line hauls over such railroads: (See Note 1).

Illinois Central Railroad (Southern Lines), except as provided in Notes "A" and "B" below.

The Yazoo and Mississippi Valley Railroad (except stations in Louisiana on the Shreveport District west of Mississippi River).

Gulf and Ship Island Railroad.

as shown in:

I. C. R. R. Tariff 36-E, I. C. C. No. 7614 (see Exceptions in Notes "A" and "B" below).

The Y. and M. V. R. R. Tariff 30-D, I. C. C. No. 8258 (except stations in Louisiana on the Shreveport District west of Mississippi River).

G. & S. I. R. R. Tariff 34-E, I. C. C. No. 1194.

**NOTE A.**—The provisions of Section No. 2 apply to, from or between stations in the Birmingham District of the Illinois Central Railroad only as follows:

(a) Between stations, Haleyville, Ala., to Corinth, Miss., inclusive.

(b) Between stations, Haleyville, Ala., to Corinth, Miss., inclusive.

and

Birmingham, Ala. (see Note "B"), and points in the Birmingham, Ala., Switching district.

(c) Between stations, Haleyville, Ala., to Corinth, Miss., inclusive; also Birmingham, Ala. (see Note "B"), and points in the Birmingham, Ala., Switching District, except points on Bessemer Branch.

and

Stations on Illinois Central Railroad other than Birmingham District, Corinth, Miss., to Birmingham, Ala., inclusive. (See Note "B".)

**NOTE B.**—(a) Rates published in Section No. 2 on Cotton seed to Birmingham, Ala., will not apply when shipments of Cottonseed Products are destined to stations in States of Alabama (except stations on Illinois Central R. R.), Florida, Georgia, North Carolina, and South Carolina. Rates will apply to stations on Illinois Central R. R. in Alabama when routed via Illinois Central R. R., direct.

(b) On Cottonseed Products from Birmingham, Ala., destined to stations in states other than enumerated in paragraph (a), rates



published in Section 2 herein, on Cottonseed to Birmingham, Ala., will apply only when shipments of Cottonseed Products from Birmingham, Ala., are routed over the rails of the Illinois Central R. R., through or via Corinth, Miss.

(c) When shipments are not handled in accordance with paragraphs (a) and (b), local rates will be applied on Cottonseed from point of origin to Birmingham, Ala., and no readjustment will be made under the provisions of Section No. 2 of this Tariff.

**NOTE 1.**—On Cottonseed originating at stations on the Mississippi & Skuna Valley Railroad shipped to Greenwood, Miss., for cracking, crushing, delinting, or other manufacturing processes under the rules of this tariff, and shipment of the product thereof (as defined in Rule 30 of tariff, as amended), via the Y. & M. V. R. R., rate of 8 cents per 100 pounds to Greenwood, Miss., shown on page 10 of tariff will be applied.

#### List of Stations to and From Which Distance Rates Shown in Section No. 3 Apply <sup>1 2</sup>

Rates published in Section No. 3 are permanent rates and do not expire with December 31, 1941.

The distance rates provided in Section No. 3 apply between stations on the following railroads for Single or Joint line hauls over such railroads:

Illinois Central Railroad (Southern Lines) except as provided in Note "D" below.

The Yazoo and Mississippi Valley Railroad (except stations in Louisiana on the Shreveport District west of the Mississippi River).

Gulf and Ship Island Railroad.

as shown in:

ICRR Tariff 36-E, ICC No. 7614 (see Exceptions in Note "D" below).

The Y&MV RR Tariff 30-D ICC No. 8258 (except stations in Louisiana on the Shreveport District west of the Mississippi River).

G&SI RR Tariff 34-E ICC No. 1194.

**NOTE D.**—The provisions of Section No. 3 apply between stations on the Birmingham District of the Illinois Central Railroad only as follows:

<sup>1</sup> Reduction.

<sup>2</sup> Effective November 10, 1941. Issued on fifteen days' notice under permission of the Interstate Commerce Commission No. 5001 of October 14, 1941.

Issued on one day's notice under permission of the Alabama Public Service Commission No. 134 of October 18, 1941.

Issued on one day's notice under permission of the Kentucky Railroad Commission Short Notice Order No. 523.



(a) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive.

(b) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive.

and

Birmingham, Ala., and points in the Birmingham, Ala., Switching District.

(c) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive; also Birmingham, Ala., and points in the Birmingham, Ala., Switching District.

and

Stations on Illinois Central Railroad other than Birmingham District, Corinth, Miss., to Birmingham, Ala., inclusive.

## SECTION No. 2

(For Application, refer to pages 4 to 9 of tariff, as amended)

Rule 30<sup>a</sup> Cancels Rule 30 of Supplement No. 6. Application  
(EL-363-4571)

(a) The rates and rules, as authorized in Section No. 2 of tariff, as amended, apply on Cottonseed in carloads to and from stations shown under "List of Station to and From Which Rates Shown in Section No. 2 Apply" and in miscellaneous items on pages 11 and 12 of tariff moved solely (see Noe 1) via the Illinois Central R. R., The Yazoo and Mississippi Valley R. R., and/or the Gulf and Ship Island R. R. from origin to manufacturing or mill stations for cracking, crushing, delinting, or other manufacturing processes, and the subsequent shipment of the product as described in Rule No. 32 of tariff, in carloads, or less than carload quantities, from the manufacturing or mill station via Illinois Central R. R., The Yazoo and Mississippi Valley R. R. and/or Gulf and Ship Island R. R. (See Exception.)

(b) The rates shown in Section No. 2 of tariff, as amended, must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates applicable to manufacturing or mill station proper, in effect on date of shipment from point of origin and freight charges will be collected by the agent at such rates upon delivery.

(c) Upon evidence, as provided for herein, of shipment of product of Cottonseed, as described in Rule No. 32 of tariff, in carload or less than carload quantities, via Illinois Central R. R., The Yazoo and Mississippi Valley R. R., and/or the Gulf and Ship Island

<sup>a</sup> Reissued from Supplement No. 7, effective August 23, 1939.



R. R. at full published tariff rates applying from manufacturing or mill station, the freight charges on Cottonseed to the manufacturing or mill station will be reduced to the basis of rates, shown on pages 10, 11, and 12 of tariff, through the Freight Claim Department. (See Exception.)

For every 100 pounds of weight represented by paid inbound freight bills on Cottonseed, surrendered for refund, there must be furnished evidence of shipment from the mill station of 93 pounds of Cottonseed Products named in Rule No. 32 of tariff. When paid inbound freight bills are surrendered at this ratio, the net rates shown on pages 10, 11, and 12 of tariff shall be applied to 93 percent of the weight of the inbound Cottonseed. In event there is a deficit between 93 percent of actual weight of Cottonseed and minimum weight of 30,000 pounds, such deficit shall be charged for on basis of carload rate lawfully applicable on Cottonseed when for disposition other than for manufacture and reshipment. In no case shall total charge be less than 30,000 pounds, figured at applicable net rate shown on pages 10, 11, and 12 of tariff.

**Exception.**—Rates provided in this Section do not apply on traffic reshipped direct from crude oil mills to destination in States of Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri (on and north of the line of the C. R. I. & P. Ry., St. Louis to Chilhowee, Mo., thence M. K. T. R. R., Chilhowee to West Line, Mo.), Montana, Nebraska, North Dakota, South Dakota, Oregon, Wisconsin, Washington, and Wyoming via routes through the States of Arkansas, Louisiana (west of Mississippi River) or Texas.

**NOTE 1.**—On Cottonseed originating at stations on the Mississippi & Skuna Valley R. R. shipped to Greenwood, Miss., for cracking, crushing, delinting, or other manufacturing processes under the rules of this tariff, and shipment of the product thereof, as described in Rule No. 32 of tariff, via The Y. and M. V. R. R., rate of 8 cents per 100 pounds to Greenwood, Miss., shown on page 11 of tariff, will be applied.

#### Rule 32 \* Cancels Rule 32 of Tariff

Rates and rules in Section 2 of Tariff, as amended, apply in connection with following products shipped from manufacture or mill station:

Cottonseed cake or meal (including crushed or ground cake or screenings).

Cottonseed hull fibre or shaving (other than bleached or dyed).

Cottonseed hulls, not ground.

Cottonseed hulls, ground (Cotton seed hull bran).

\* Reissued from Supplement No. 11, effective March 10, 1941.



Cottonseed hull shavings pulp and cotton linters pulp.  
 Cotton linters or regins (other than bleached or dyed).  
 Cottonseed oil, liquid or solidified (hydrogenated).  
 Oil, cooking and/or salad (made wholly of cottonseed oil).<sup>5</sup>  
 Cottonseed oil foots or sediment.<sup>5</sup>

Cotton motes or cotton sweepings (cotton refuse from cottonseed oil mills).

Feed, Cattle, consisting of not less than 65% Cottonseed Meal and Cotton Seed Hulls nor more than 10% Cracked Corn and 10% Alfalfa, remainder made up of Molasses, Calcium, and Salt, or Salt without Molasses. C. L. (See Note 2) (EN262-657) (DA-84171).

Vegetable oil shortening in semi-solid form or plastic form (made wholly of cottonseed oil).<sup>5</sup>

NOTE 2.—Only the weight of the Cottonseed Meal and Cottonseed Hulls of the outbound shipment shall be used in determining the application of net rates on Cottonseed shown in Section 2 of Tariff, as amended.

# Rule 55 Cancels Rule 55 of Tariff. Shipments From Connecting Lines \*

The rates published in Section No. 2 of tariff, as amended, also apply from junctions of the Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Fernwood, Columbia & Gulf Railroad and/or Gulf and Ship Island Railroad with connecting lines on shipments originating at stations on connecting lines from which no through net rates are published, subject to the rules herein; also from Vicksburg, Miss., on cottonseed originating at stations on connecting lines of The Yazoo and Mississippi Valley R. R. received from such connections at Louisiana junctions when moving through Vicksburg, Miss.

(EL-262-588) (D. A. 70026)

*Rates of freight in cents per 100 pounds applying on cottonseed, carloads, minimum weight 30,000 pounds*

Item No.	From—	To—	Rate	Route No.
63 <sup>1</sup>	Michigan City, Miss.	Birmingham, Ala. (EL-27-	12	1
	Lamar, Miss.	728) (D. A. 68326)		
	Hudsonville, Miss.	Memphis, Tenn.		
85-a cancels 85 <sup>2</sup>	G. M. & N. R. R.—Jackson, Tenn (EL-493-521).		6½	8

<sup>1</sup> Reissued from Supplement No. 8, effective October 15, 1939.

<sup>2</sup> Reissued from Supplement No. 3, effective October 25, 1938.

<sup>5</sup> Applicable only at Brookhaven, Miss.; Hazelhurst, Miss.; Helena, Ark.; Jackson, Miss.; Magnolia, Miss.; Memphis, Tenn.; and New Orleans, La.

<sup>6</sup> Reissued from Supplement No. 9, effective December 12, 1939.

For explanation of Route Nos., see page 12 of tariff.



SECTION No. 3 (New)<sup>1 2</sup>

(For Application of Rates, see page 4 of Tariff, as amended)

(Rates published in Section No. 3 are permanent rates and do not expire with December 31, 1941.) Rates of Freight in cents per 100 pounds applying on Soya Beans, Carload, Minimum Weight Marked Capacity of Car.

Distance or Mileage Commodity rates shown in Section No. 3 may be used only when no specific through commodity rates from and to the same points have been provided. When governed by a Classification which also contains Distance or Mileage commodity rates they will take precedence over the distance or mileage commodity rates in such classification.

Distances	In cents per 100 pounds	Distances	In cents per 100 pounds
10 mi. and less	6½	85 mi. and over 80	11
15 mi. and over 10	6½	100 mi. and over 85	12
25 mi. and over 15	7½	120 mi. and over 100	13
30 mi. and over 25	8	140 mi. and over 120	14
35 mi. and over 30	8½	160 mi. and over 140	15
40 mi. and over 35	9	180 mi. and over 160	16
45 mi. and over 40	9½	200 mi. and over 180	17
55 mi. and over 45	9½	220 mi. and over 200	18
65 mi. and over 55	10	240 mi. and over 220	18
70 mi. and over 65	10	260 mi. and over 240	19
75 mi. and over 70	10½	280 mi. and over 260	20
80 mi. and over 75	11	300 mi. and over 280	21

Table of Distances

For Distances to use in connection with this Tariff refer to Illinois Central Railroad Tariff No. 36-E ICC No. 7614, The Yazoo and Mississippi Valley Railroad Tariff No. 30-D ICC No. 8258 (stations east of the Mississippi River only) and Gulf and Ship Island Railroad Tariff No. 34-E, ICC No. 1194.

<sup>1</sup> Will not apply on Mississippi Intrastate traffic.

<sup>2</sup> Effective November 10, 1941. Issued on fifteen days' notice under permission of Interstate Commerce Commission No. 5001 of October 14, 1941.

Issued on one day's notice under permission of the Alabama Public Service Commission No. 134 of October 18, 1941.

Issued on one day's notice under permission of the Kentucky Railroad Commission Short Notice Order 523.



**MISSISSIPPI INTRASTATE****ILLINOIS CENTRAL RAILROAD COMPANY, THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY IN CONNECTION WITH PARTICIPATING CARRIERS SHOWN IN TARIFF**

Supplement No. 1-A. (Supplements Nos. (1)<sup>1</sup> and 1-A<sup>2</sup> contain all changes from original tariff effective on date hereof, to 2912-Q, Local and Joint Freight Tariff Publishing Rates, Rules, and Regulations Applying on Cottonseed, Carloads, Minimum Weight, 30,000 Pounds, for Single and Joint Line Application Between Stations on Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Gulf and Ship Island Railroad, and Connecting Lines. Also Between Stations on Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Gulf & Ship Island Railroad and Connecting Lines, When for Cracking, Crushing, Delinting or Other Manufacturing Process and Reshipment. Also Distance or Mileage Rates as Shown on Page 6 of Tariff, Section No. 1 and Page 10 of Tariff, Section No. 2)

Issued August 12, 1938. (Issued under authority of the Mississippi Railroad Commission of September 28, 1936). Effective September 1, 1938. Issued by R. A. Trovillion, General Freight Agent, 135 East 11th Place, Chicago, Illinois. F. H. Law, General Traffic Manager, Chicago, Illinois. William Haywood, Freight Traffic Manager, Chicago, Illinois.

<sup>1</sup> Suspension Supplement (I&S 4515).

<sup>2</sup> Intrastate.



## SECTION No. 1

(For Application, See Page No. 6 of Tariff)

## SECTION No. 2

(For Application, See Page 10 of Tariff)

Item No.	From—	To—	Rate
35-A (Cancels 35) <sup>1</sup>	Miss. C. R. R. Stations	Jackson, Miss.	Cancel. For rates refer to Item 57 of Section No. 2.

Item No.	From—	To—	Rate (in cents per 100 pounds)	Route
	Miss. C. R. R.			
	Brookhaven, Miss.		8.0	10
	Bude, Miss.		9.5	10
	Carlos, Miss.		8.0	10
	Celco, Miss.		9.0	10
	Cobba, Miss.		8.0	10
	Cranfield, Miss.		10.5	10
	Eddiceton, Miss.		9.0	10
	Fenwick, Miss.		10.8	10
	Kirby, Miss.		10.0	10
	Leendale, Miss.		10.5	10
57 (New) <sup>1</sup>	Lucien, Miss.	Jackson, Miss.	9.0	10
	McCall, Miss.		9.5	10
	Meadville, Miss.		9.5	10
	Mill Branch, Miss.		9.5	10
	Monroe, Miss.		9.5	10
	Quentin, Miss.		9.0	10
	Roxie, Miss.		10.0	10
	Washington, Miss.		11.0	10
	Williams, Miss.		8.5	10
	Zetua, Miss.		8.0	10

Route No. 10.—Miss. Cent. R. R., Brookhaven, Miss., I. C. R. R.

<sup>1</sup> Change in wording which results in neither increases nor reductions in charges.

## Abbreviations

Abbreviations	Explanations
&	And
Ala.	Alabama
Ark.	Arkansas
C. & C.	Canton & Carthage Railroad.
C. L.	Carloads.
Co.	Company.
F. C. & G. R. R.	Fernwood, Columbia & Gulf Railroad.
G. M. & N. R. R.	Gulf, Mobile and Northern Railroad.
G. & S. I. R. R.	Gulf and Ship Island Railroad.
I. C. C.	Interstate Commerce Commission.
I. C. R. R.	Illinois Central Railroad.
Ill.	Illinois.
Illinois Central System	Illinois Central Railroad Co., The Yazoo and Mississippi Valley Railroad Co., and Gulf and Ship Island Railroad Co.
Incl.	Inclusive.
Ind.	Indiana.
Jct.	Junction.
Ky.	Kentucky.
La.	Louisiana.
Miss.	Mississippi.
Miss. C. R. R.	Mississippi Central Railroad.
No.	Number.
R. R.	Railroad.
Ry.	Railway.
Via.	Namely.
Y. & M. V. R. R.	The Yazoo and Mississippi Valley Railroad.



*Index of points of origin from which specific rates are published herein*

Station	Railroad	Page No.	Item No.
Barto, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Barnfield, Miss.	Miss. C. R. R.	7-8	25-30
Beardens, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Benwood, Miss.	M. & S. V. R. R.	11	55
Bradford, Tenn.	I. C. R. R.	11	60
Brookhaven, Miss.	Miss. C. R. R.	8	35
Bruce, Miss.	M. & S. V. R. R.	11	55
Bude, Miss.	Miss. C. R. R.	7-8	25-35
Carlos, Miss.	Miss. C. R. R.	8	35
Carson, Miss.	Miss. C. R. R.	8	30
Carthage, Miss.	C. & C. R. R.	7-8-11-12	15-40-70-90
Celeo, Miss.	Miss. C. R. R.	8	35
Cobbs, Miss.	Miss. C. R. R.	8	35
Columbia, Miss.	F. C. & G. R. R.	7-11	10-75-90
Conerly, Miss.	F. C. & G. R. R.	8-12	45-95
Cranfield, Miss.	Miss. C. R. R.	8	35
Davo, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Eddickton, Miss.	Miss. C. R. R.	7-8	25-35
Edinburg, Miss.	C. & C. R. R.	7-8-11-12	15-40-70-90
Fenwick, Miss.	Miss. C. R. R.	8	35
Fernwood, Miss.	F. C. & G. R. R.	8-12	45-95
Grand Junction, Tenn.	I. C. R. R.	11	60
Greenfield, Tenn.	I. C. R. R.	11	60
Gums, Miss.	M. & S. V. R. R.	11	55
Hamare, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Hickory Valley, Tenn.	I. C. R. R.	11	60
Jackson, Tenn.	G. M. & N. R. R.	7-11	20-85
Jennings, Miss.	F. C. & G. R. R.	7-11	10-75
Kato, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Kirby, Miss.	Miss. C. R. R.	8	35
Kokomo, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Knox, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Leedsdale, Miss.	Miss. C. R. R.	8	35
Lovell, Miss.	F. C. & G. R. R.	8-12	45-95
Lucen, Miss.	Miss. C. R. R.	8	35
Martin, Tenn.	I. C. R. R.	11	60
McCall, Miss.	Miss. C. R. R.	8	35
Meadville, Miss.	Miss. C. R. R.	7-8	25-35
Mesa, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Middleburg, Tenn.	I. C. R. R.	11	60
Mill Branch, Miss.	Miss. C. R. R.	8	35
Monroe, Miss.	Miss. C. R. R.	8	35
Mound City, Ill.	I. C. R. R.	11	65
Neb, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Parsons, Miss.	F. C. & G. R. R.	8-12	45-95
Perdue, Miss.	F. C. & G. R. R.	8-12	45-95
Pittman, Miss.	M. & S. V. R. R.	11	55
Pitts, Miss.	F. C. & G. R. R.	7-11	10-75
Prentiss, Miss.	Miss. C. R. R.	7-8	25-30
Quentin, Miss.	Miss. C. R. R.	7-8	25-35
Roxie, Miss.	Miss. C. R. R.	7-8	25-35
Sharon, Tenn.	I. C. R. R.	11	60
Silver Creek, Miss.	Miss. C. R. R.	7	25
Sontag, Miss.	Miss. C. R. R.	7	25
Sumbay, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Sumrall, Miss.	Miss. C. R. R.	7-8	25-30
Tylertown, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Vaughts, Miss.	F. C. & G. R. R.	8-12	45-95
Washington, Miss.	Miss. C. R. R.	8	35
West Columbia, Miss.	F. C. & G. R. R.	7-8-11-12	10-45-75-95
Williams, Miss.	Miss. C. R. R.	8	35
Zetus, Miss.	Miss. C. R. R.	8	35



*Index of points of destination to which specific rates are published herein*

Station	Page No.	Item No.
Birmingham, Ala.	11	5 60
Brookhaven, Miss.	7-11	10-75
Cairo, Ill.	11	65
Greenwood, Miss.	11	55
Grenada, Miss.	11	55
Harlehurst, Miss.	7-11	10-75
Jackson, Miss.	7-8-11	10-15-30-35-55- 70-75-80
Kosciusko, Miss.	7-11	15-75
Laurel, Miss.	8-12	40-45-50-95
Magnolia, Miss.	7-11	10-75
Memphis, Tenn.	7-11	20-85
Newton, Miss.	7	25

### APPLICATION OF TARIFF

List of Stations To and From which Distance Rates shown in Section No. 1 apply

The distance rates provided in Section No. 1 apply between stations on the following railroads for Single or Joint line hauls over such railroads:

Illinois Central Railroad (Southern Lines), except as provided in Note "C" below.

The Yazoo and Mississippi Valley Railroad (except stations in Louisiana on the Shreveport District west of Mississippi River).

Gulf and Ship Island Railroad.

as shown in:

I. C. R. R. Tariff 36-E, I. C. C. No. 7614 (see Exceptions in Note "C" below).

The Y. and M. V. R. R. Tariff 30-C, I. C. C. No. 7506 (except stations in Louisiana on the Shreveport District west of Mississippi River).

G. & S. I. R. R. Tariff 34-D, I. C. C. No. 1188.

NOTE C.—The provisions of Section No. 1 apply between stations on the Birmingham District of the Illinois Central Railroad only as follows:

(a) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive.

(b) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive.

and

Birmingham, Ala., and points in the Birmingham, Ala., Switching District.



(c) Between Stations, Haleyville, Ala., to Corinth, Miss., inclusive; also Birmingham, Ala. and points in the Birmingham, Ala., Switching District.

and

Stations on Illinois Central Railroad other than Birmingham District, Corinth, Miss., to Birmingham, Ala., inclusive.

List of Stations To and From which Distance Rates shown in Section No. 2 apply

The distance rates provided in Section No. 2 apply from, to and between stations on the following railroads for single and joint line hauls over such railroads: (See Note 1).

Illinois Central Railroad (Southern Lines), except as provided in Notes "A" and "B" below.

The Yazoo and Mississippi Valley Railroad (except stations in Louisiana on the Shreveport District west of Mississippi River).

Gulf and Ship Island Railroad.

as shown in:

I. C. R. R. Tariff 36-E, I. C. C. No. 7614 (see Exceptions in Notes "A" and "B" below).

The Y. and M. V. R. R. Tariff 30-C, I. C. C. No. 7506, (except stations in Louisiana on the Shreveport District west of Mississippi River).

G. & S. I. R. R. Tariff 34-D, I. C. C. No. 1188.

NOTE.—The provisions of Section No. 2 apply to, from or between stations in the Birmingham District of the Illinois Central Railroad only as follows:

(a) Between stations, Haleyville, Ala., to Corinth, Miss., inclusive.

(b) Between stations, Haleyville, Ala., to Corinth, Miss., inclusive.

and

Birmingham, Ala. (see Note "B"), and points in the Birmingham, Ala., Switching District.

(c) Between stations, Haleyville, Ala., to Corinth, Miss., inclusive; also Birmingham, Ala. (see Note "B") and points in the Birmingham, Ala., Switching District.

and

Stations on Illinois Central Railroad other than Birmingham District, Corinth, Miss., to Birmingham, Ala., inclusive. (See Note "B").

NOTE B.—(a) Rates published in Section No. 2 on Cottonseed to Birmingham, Ala., will not apply when shipments of Cotton-



seed Products are destined to stations in States of Alabama (except stations on Illinois Central R. R.), Florida, Georgia, North Carolina and South Carolina. Rates will apply to stations on Illinois Central R. R. in Alabama when routed via Illinois Central R. R., direct.

(b) On Cottonseed Products from Birmingham, Ala., destined to stations in states other than enumerated in paragraph (a), rates published in Section 2 herein, on Cottonseed to Birmingham, Ala., will apply only when shipments of Cottonseed Products from Birmingham, Ala., are routed over the rails of the Illinois Central R. R., through or via Corinth, Miss.

(c) When shipments are not handled in accordance with paragraphs (a) and (b), local rates will be applied on Cottonseed from point of origin to Birmingham, Ala., and no readjustment will be made under the provisions of Section No. 2 of this Tariff.

**NOTE 1.**—On Cottonseed originating at stations on the Mississippi & Skuna Valley Railroad shipped to Greenwood, Miss., for cracking, crushing, delinting or other manufacturing processes under the rules of this tariff, and shipment of the product thereof (as defined in Rule 30 herein), via The Y. & M. V. R. R., rate of 8 cents per 100 pounds to Greenwood, Miss., shown on page 10 herein will be applied.

#### **RULES AND REGULATIONS**

##### **Rule 1—Handling Remnant Shipments**

(Not applicable on traffic having origin, destination and entire transportation within States of Alabama or Mississippi, as case may be)

One remnant shipment of cottonseed, may be forwarded from each warehouse by one shipper at the end of each shipping season on basis of carload rate at actual weight, subject to a minimum weight of 20,000 pounds.

##### **Rule 5—Changes in Rates and Rules**

In the event changes are made in Rates and Rules published herein after the Cottonseed is shipped from point of origin, the Rates and Rules in effect on date of shipment from points of origin will apply.

##### **Rule 10—Terminal, Transit and Other Privileges and Charges**

In the absence of specific provision to the contrary, shipments transported under this Tariff will be subject to all terminal charges and allowances relating to: Arbitraries, Car Rentals, Car Service, Demurrage, Diversion, Drayage, Grading, Handling, Inspection,



Mileage on Private Cars, Milling, Reconsignment, Storage, Switching, Transit Privileges, Wharfage, together with all other privileges, charges and rules which in any way increase or decrease the amount to be paid on any shipment between points named in this Tariff or as same may be amended, or which increase or decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

In the absence of specific provisions in this Tariff to the contrary, property destined to points beyond the tracks of the Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad and/or Gulf and Ship Island Railroad, is entitled to such privileges and will be subject to such charges as provided in tariffs, and supplements thereto, published and lawfully on file with the Interstate Commerce Commission of the carriers granting the privilege and performing the service.

#### Rule 15—Application of Rates from Intermediate Points

Subject to the provisions of Notes 1, 2, 3 and 4 belcw, from any point of origin from which a commodity rate on a given article to a given destination and via a given route is not named in this Tariff, which point is intermediate to a point from which a commodity rate on said article is published in this Tariff via a route through the intermediate point over which such commodity rate applies to the same destination, apply from such intermediate point to such destination and via such route the commodity rate in this Tariff on said article from the next point beyond from which a commodity rate is published herein on that article to the same destination via the same route.

**NOTE 1.**—When by reason of branch or diverging lines, there are two or more "next beyond" points, apply the rate from the next point beyond (in this Tariff) which, on that article to the same destination via the same route, results in the lowest charge.

**NOTE 2.**—If the intermediate point is located between two points from which commodity rates on the same article via the same route are published in this Tariff, apply via that route from the intermediate point the rate from the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point from which the lowest charge is applicable.

**NOTE 3.**—If the class rate on the same article via the same route from the intermediate point produces a lower charge than would result from applying the commodity rate under this rule, such commodity rate will not apply.



**NOTE 4.**—If there is, in any other tariff, a commodity rate on the same article from the intermediate point applicable over the same route to the same destination, the provisions of this rule are not applicable from such intermediate origin point.

#### Rule 20—Application of Rates to Intermediate Points

Subject to the provisions of Notes 1, 2, 3 and 4 below, to any point of destination to which a commodity rate on a given article from a given point of origin and via a given route is not named in this Tariff, which point is intermediate to a point to which a commodity rate on said article is published in this Tariff via a route through the intermediate point over which such commodity rate applies from the same point of origin, apply to such intermediate point from such point of origin and via such route the commodity rate published herein on that article from the same point of origin via the same route.

**NOTE 1.**—When, by reason of branch or diverging lines, there are two or more "next beyond" points, apply the rate to the next point beyond (in this tariff) which, on that article from the same point of origin via the same route, results in the lowest charge.

**NOTE 2.**—If the intermediate point is located between two points to which commodity rates on the same article via the same route are published in this Tariff, apply via that route to the intermediate point the rate to the next point in either direction which results in the higher charge. In applying this note, if there are two or more next beyond points due to branch or diverging lines, eliminate all such next beyond points except the point to which the lowest charge is applicable.

**NOTE 3.**—If the class rate on the same article via the same route to the intermediate point produces a lower charge than would result from applying the commodity rate under this rule, such commodity rate will not apply.

**NOTE 4.**—If there is, in any other tariff, a commodity rate on the same article to the intermediate destination point applicable over the same route from the same point of origin, the provisions of this rule are not applicable to such intermediate destination point.

#### Rule 22—Departures from Fourth Section

This schedule contains rates that are departures from the terms of the amended Fourth Section of the Interstate Commerce Act, under authority of the Interstate Commerce Commission Fourth Section Order No. 13650 of March 8, 1938.

The increase in rates and charges provided herein which result in departures from outstanding orders of the Interstate Commerce Commission is established under authority of the Interstate Com-



merce Commission in Fifteen Percent Case of 1937-1938, Ex Parte 123, dated March 8, 1938.

### Rule 25—Joint Rates

The joint rates published herein, includes all charges for switching, drayage or other transfer services at intermediate interchange points on shipments handled through and not stopped for special services at such intermediate interchange points.

### Rule No. 27—Reference to Items, Notes, Rules, Tariffs, Etc.

Where cross reference is made in this tariff to items, notes, rules, tariffs, etc., such references are continuous, and include supplements to or successive issues to such tariffs; also successive issues of such items, notes, rules, etc.

### Rule No. 28—Definition of Intrastate Traffic

Where reference is made herein to intrastate traffic it means, traffic having origin, destination and entire transportation within the state in which both origin and destination are located.

## SECTION No. 1

(For Application, see page 4 herein)

**Rates of Freight in Cents Per Ton, 2,000 Pounds, Applying on Cottonseed,<sup>1</sup> Carloads, Minimum Weight 30,000 Pounds**

Distance rates shown below are local rates and apply between stations, as provided in Section No. 1 on page 4 herein.

(Distance rates do not apply to or from Cairo, Metropolis, Ill., Evansville, Ind. or Helena, Ark. For distance rates to or from Cairo, Metropolis, Ill., Evansville, Ind., and Helena, Ark., see basis provided in Item 5)

Distance or Mileage Commodity rates shown in Section No. 1 may be used only when no specific through commodity rates from and to the same stations have been provided. When governed by a Classification which also contains Distance or Mileage commodity rates they will take precedence over the distance or mileage commodity rates in such Classification.

<sup>1</sup> Rates also apply on Alabama or Louisiana or Mississippi Intrastate traffic (as case may be). Issued under authority of A. P. R. C. Special Approval No. 5990 of July 11, 1934, L. P. R. C. No. 5954-B of July 13, 1934, and Mississippi Railroad Commission of July 7, 1934.



Distance in miles	In cents per ton, 2,000 pounds	Distance in miles	In cents per ton, 2,000 pounds
5 and under	84	95 and over 95	188
10 and over 5	84	100 and over 95	188
15 and over 10	84		
20 and over 15	108	110 and over 100	189
25 and over 20	108	120 and over 110	189
		130 and over 120	189
30 and over 25	108	140 and over 130	210
35 and over 30	108	150 and over 140	210
40 and over 35	128		
45 and over 40	128	160 and over 150	210
50 and over 45	128	170 and over 160	221
		180 and over 170	221
55 and over 50	128	190 and over 180	221
60 and over 55	147	200 and over 190	221
65 and over 60	147		
70 and over 65	147	210 and over 200	231
75 and over 70	147	220 and over 210	252
		230 and over 220	252
80 and over 75	168	240 and over 230	252
85 and over 80	168	250 and over 240	273
90 and over 85	168	260 and over 250	273

TABLE OF DISTANCES

For Distances to use in connection with this Tariff, refer to Illinois Central Railroad Tariff No. 36-E, I. C. C. No. 7614, The Yazoo and Mississippi Valley Railroad Tariff No. 30-C, I. C. C. No. 7506 (stations east of the Mississippi River only), and Gulf and Ship Island Railroad Tariff No. 34-D, I. C. C. No. 1188.

Item 5—Basis for Freight To and From Cairo, Metropolis, Ill., Evansville, Ind., and Helena, Ark.

To make rates to or from—	Add to rates to or from—	In cents per ton 2,000 pounds
Cairo, Ill.	East Cairo, Ky.	42
Evansville, Ind.	Henderson, Ky.	42
Helena, Ark.	Trotters Point, Miss.	42
Metropolis, Ill.	Paducah, Ky.	42



**Item 10—Rates of Freight in Cents per Ton 2,000 Pounds, Cottonseed, Carloads, Minimum Weight 30,000 Pounds**

(Applicable only via Route No. 2)

From—	To—			
	Magnolia, Miss.	Brookhaven, Miss.	Haselhurst, Miss.	Jackson, Miss.
F. C. & G. R. R.				
Barto, Miss.	116	156	179	200
Beardens, Miss.	116	137	158	200
Columbia, Miss.	156	179	200	221
Davo, Miss.	137	158	179	222
Hamago, Miss.	158	179	200	221
Jennifers, Miss.	116	137	158	200
Kloto, Miss.	137	158	179	200
Knozo, Miss.	137	158	179	221
Kokomo, Miss.	137	179	200	221
Mesa, Miss.	137	158	179	200
Neb, Miss.	158	179	200	221
Pitts, Miss.	116	137	158	200
Sumbax, Miss.	158	179	200	221
Tyertown, Miss.	137	158	179	221
West Columbia, Miss.	158	179	200	221

**Rates of Freight in Cents per 100 Pounds, Except as Otherwise Provided Applying on Cottonseed, Carloads, Minimum Weight 30,000 Pounds**

Item No.	From--	To--	Rate (in cents per ton 2,000 pounds)	Route
	C. & C. R. R.			
	Carthage, Miss.	Jackson, Miss.	9	3
		Kosciusko, Miss.	10	3
175	C. & C. R. R.			
	Edinburg, Miss.	Jackson, Miss.	9	3
		Kosciusko, Miss.	10	3
	G. M. & N. R. R.			
20	Jackson, Tenn.	Memphis, Tenn.	168	8
	Miss. C. R. R.			
	Bamfeld, Miss.		12	9
	Bude, Miss.		12	9
	Eddiston, Miss.		12	9
	Meadville, Miss.		12	9
128	Prentiss, Miss.		12	9
	Quentin, Miss.	Newton, Miss.	12	9
	Roxie, Miss.		13	9
	Silver Creek, Miss.		11	9
	Sontag, Miss.		11	9
	Sumrall, Miss.		13	9

<sup>1</sup> Applicable only on Intrastate Traffic.

For Explanation of Route Nos., see page 12.



**Rates of Freight in Cents Per Ton, 2,000 Pounds, Except As Noted  
Applying on Cottonseed, Carloads, Minimum Weight 30,000  
Pounds**

Item No.	From—	To—	Rate (In cents per 100 pounds)	Route	
30	Miss. C. R. R.				
	Bausfield, Miss.	Jackson, Miss.	210	10, 11, 12	
	Carson, Miss.		210	10, 11, 12	
	Prentiss, Miss.		210	10, 11, 12	
	Sumrall, Miss.		221	10, 11, 12	
35	Miss. C. R. R.				
	Brookhaven, Miss.	Jackson, Miss.	8.0	10	
	Bude, Miss.		9.5	10	
	Carlos, Miss.		8.0	10	
	Celco, Miss.		9.0	10	
	Cobbs, Miss.		8.0	10	
	Cranfield, Miss.		10.5	10	
	Eddiceton, Miss.		9.0	10	
	Fenwick, Miss.		10.5	10	
	Kirby, Miss.		10.0	10	
	Leesdale, Miss.		10.5	10	
	Lucien, Miss.		9.0	13	
	McCall, Miss.		9.0	10	
	Meadville, Miss.		9.5	10	
	Mill Branch, Miss.		9.5	10	
	Monroe, Miss.		9.5	10	
	Quentin, Miss.		9.0	10	
	Roxie, Miss.		10.0	10	
	Washington, Miss.		11.0	10	
	Williams, Miss.		8.5	10	
	Zetux, Miss.		8.0	10	
	40		C. & C. R. R.		
		Carthage, Miss.	Laurel, Miss.	221	13
		Edinburg, Miss.		221	13
		F. C. & G. R. R.			
		Barto, Miss.	Laurel, Miss.	242	14
Beardens, Miss.		242		14	
Conerly, Miss.		242		14	
Davo, Miss.		242		14	
Fernwood, Miss.		242		14	
Hamars, Miss.		221		14	
Kloto, Miss.	242	14			
Knox, Miss.	242	14			
Kokomo, Miss.	221	14			
Lovell, Miss.	221	14			
Mesa, Miss.	242	14			
Neb, Miss.	221	14			
Parsons, Miss.	242	14			
Purdue, Miss.	221	14			
Sumbar, Miss.	221	14			
Tylertown, Miss.	242	14			
Vaughts, Miss.	242	14			
West Columbia, Miss.	221	14			

<sup>1</sup> Applicable only on Intrastate Traffic.

For Explanation of Route Nos., see page 12.

## SECTION No. 2

### Rule 30—Application

(a) The rates and rules, as authorized in Section No. 2 apply on Cottonseed in carloads to and from stations shown under



"List of Stations To and From Which Rates Shown in Section No. 2 Apply," and in miscellaneous items on pages 11 and 12 moved solely (see Note 1) via the Illinois Central R. R., The Yazoo and Mississippi Valley R. R. and/or the Gulf and Ship Island R. R. from origin to manufacturing or mill stations for cracking, crushing, delinting or other manufacturing processes, and the subsequent shipment of the products as described in Rule No. 32, in carload, or less than carload quantities, from the manufacturing or mill station via Illinois Central R. R., The Yazoo and Mississippi Valley R. R. and/or Gulf and Ship Island R. R. (See Exception.)

(b) The rates shown in Section No. 2 must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates applicable to manufacturing or mill station proper, in effect on date of shipment from point of origin and freight charges will be collected by the agent at such rates upon delivery.

(c) Upon evidence, as provided for herein, of shipment of product of Cottonseed, as described in Rule No. 32, in carload or less than carload quantities, via Illinois Central R. R., The Yazoo and Mississippi Valley R. R. and/or the Gulf and Ship Island R. R. at full published tariff rates applying from manufacturing or mill station, the freight charges on Cottonseed to the manufacturing or mill station will be reduced to the basis of rates, shown on pages 10, 11, and 12 herein, through the Freight Claim Department. (See Exception.)

For every 100 pounds of weight represented by paid inbound freight bills on Cottonseed, surrendered for refund, there must be furnished evidence of shipment from the mill station of 93 pounds of Cottonseed Products named in Rule No. 32. When paid inbound freight bills are surrendered at this ratio, the net rates shown on pages 10, 11, and 12 herein shall be applied to 93 per cent of the weight of the inbound Cottonseed. In event there is a deficit between 93 percent of actual weight of Cottonseed and minimum weight of 30,000 pounds, such deficit shall be charged for on basis of carload rate lawfully applicable on cottonseed when for disposition other than for manufacture and reshipment. In no case shall total charge be less than 30,000 pounds, figured at applicable net rate shown on pages 10, 11, and 12 herein.

Exception.—Rates provided in this Section do not apply on traffic reshipped to destinations in States of Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Oregon, Wisconsin, Washington, and Wyoming via routes through the States of Arkansas, Louisiana (west of Mississippi River), or Texas.



### Rule 32—Outbound Products

Rates and rules in Section 2 apply in connection with following products shipped from manufacture or mill station:

Cottonseed cake or meal (including crushed or ground cake or screenings).

Cottonseed hull fibre or shavings (other than bleached or dyed).

Cottonseed hulls, not ground.

Cottonseed hulls, ground (Cotton seed hull bran).

Cottonseed hull shavings pulp and cotton linters pulp.

Cotton linters or regins (other than bleached or dyed).

Cottonseed oil, liquid, or solidified (hydrogenated).

<sup>1</sup> Oil, cooking, and/or salad (made wholly of cottonseed oil).

**NOTE 1.**—On Cottonseed originating at stations on the Mississippi & Skuna Valley R. R. shipped to Greenwood, Miss., for cracking, crushing, delinting or other manufacturing processes under the rules of this tariff, and shipment of the product thereof, as described in Rule No. 32, via The Y. and M. V. R. R., rate of 8 cents per 100 pounds to Greenwood, Miss., shown on page 11 herein, will be applied.

<sup>1</sup> Cottonseed oil foots or sediment.

Cotton motes or cotton sweepings (cotton refuse from cottonseed oil mills).

<sup>1</sup> Vegetable oil shortening in semi-solid form or plastic form (made wholly of cottonseed oil).

### Rule 35—Time Limit of Freight Bills

Shipments of manufactured product, as described in Rule No. 32, in carload or less than carload quantities, must be made within one year from the date of paid freight bill covering inbound movement of Cottonseed.

### Rule 40—Method of Settlement

(a) Cottonseed intended for handling under Section No. 2 must be consigned locally to the manufacturing or mill station.

(b) Bills of lading for the product, as described in Rule No. 32, carload or less than carload quantities, shipped from the manufacturing or mill station, shall be issued by the agent at such station at rates applicable on outbound commodities from such station proper to final destination.

(c) The application of rates on Cottonseed, inbound, as authorized in Section No. 2 will be effected by claim. Claims must

<sup>1</sup> Applicable only at Brookhaven, Miss.; Hanlehurst, Miss.; Helena, Ark.; Jackson, Miss.; Memphis, Tenn.; and New Orleans, La.



be supported with copies of the outbound bills of lading or other satisfactory evidence of reshipment from the manufacturing or mill station, together with statements showing movement of the Cottonseed on which rates are applicable inbound and shipments of the outbound product from the manufacturing or mill station, such claims to be tendered to the local Agent of the I. C. R. R., The Y. and M. V. R. R. and/or G. & S. I. R. R. (as the case may be), who will attach copy of outbound waybills from manufacturing or mill station together with original inbound paid freight bills and reshipping certificate prescribed in Rule 45 herein

#### Rule 45—Certificate to be Attached to Claims

Claims must be accompanied by certificate in following form:

Tender is hereby made to the Illinois Central Railroad Co., The Yazoo and Mississippi Valley Railroad Co., and/or Gulf and Ship Island Railroad Co. (as the case may be), of paid freight bills numbered and dated as specified below for the purpose of securing application of rates as provided in I. C. R. R. Co., The Y. and M. V. R. R. Co., and G. & S. I. R. R. Co. Tariff 2912-Q, I. C. C. No. 8206, on the commodity covered thereby. This tender is made in good faith and with the specific guarantee on our part that such rates may legally be applied under the rules of said railroads as published in their Tariff No. 2912-Q, I. C. C. No. 8206, issued July 19, 1938, or supplements thereto. Paid Freight Bills.....Pro. No.....Date  
-----Manufacturing Point-----

-----  
(Signature of Claimant)

#### Rule 50—Supervision and Inspection

The traffic handled at rates and under rules shown in Section No. 2 herein shall be subject to supervision of an inspector or inspectors who shall have access to records of railroads and of shippers for the purpose of determining accuracy of documents submitted in support of claims for protection of rates shown on pages 10, 11, and 12 herein.

Among other duties, it shall be the duty of the inspector to:

- (a) Check, compare, and verify inbound road's freight bills.
- (b) Check records of railroads and shippers for the purpose of determining actual characters and weight of outbound shipments, in order that correctness of claims may be fully shown.



**Rule 55—Shipments From Connecting Lines**

The rates published in Section No. 2 herein also apply from junctions of the Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Fernwood, Columbia & Gulf Railroad, and/or Gulf and Ship Island Railroad with connecting lines, on shipments originating at points on connecting lines from which no through net rates are published, subject to the rules herein.

**Rule 60—Validity of Paid Freight Bills Reshipping Certificate**

In instances where shipper at transit point, for commercial reasons, forwards shipments from transit point in name of another party, firm, or corporation, the actual transit shipper must add to reshipping certificate quoted in Rule 45, herein, the following:

For commercial reasons the shipment from-----  
(insert name of transit point), in car----- (in-  
sert car initial and number), shows consignor as follows:  
----- (Signature of Shipper)

**Rule 65—Change of Ownership of Cottonseed**

A transfer by mills of paid freight bills covering cottonseed will be permitted only where commodity is also transferred by bona fide sale. A certificate to this effect shall be made in following form on the face of the freight bill:

"This is to certify that there has been a bona fide sale to the undersigned of the commodity covered by this freight bill."

Signed-----  
Dated-----

**Rates of Freight Applying on Cottonseed, Carloads, Minimum Weight 30,000 Pounds**

(Distance rates do not apply to or from Cairo, Metropolis, Ill., Evansville, Ind., or Helena, Ark. For distance rates to or from Cairo, Metropolis, Ill., Evansville, Ind., and Helena, Ark., see basis provided in Item 50.)

Distance or Mileage Commodity rates shown in Section 2 may be used only when no specific through commodity rates from and to the same points have been provided. When governed by a Classification which also contains Distance or Mileage commodity rates they will take precedence over the distance or mileage commodity rates in such Classification.



Distances	In cents per 100 pounds	Distances	In cents per 100 pounds
10 miles and less	2.75	100 miles and over 85	7.0
15 miles and over 10	3.25	130 miles and over 100	7.5
25 miles and over 15	3.75	150 miles and over 130	8.0
35 miles and over 25	4.25	170 miles and over 150	8.5
45 miles and over 35	4.75	190 miles and over 170	9.0
55 miles and over 45	5.5	210 miles and over 190	9.5
70 miles and over 55	6.0	230 miles and over 210	10.0
85 miles and over 70	6.5	250 miles and over 230	10.5

Table of Distances

For Distances to use in connection with this Tariff, refer to Illinois Central Railroad Tariff No. 36-E, I. C. C. No. 7614, The Yazoo and Mississippi Valley Railroad Tariff No. 30-C, I. C. C. No. 7506 (stations east of Mississippi River only), and Gulf and Ship Island Railroad Tariff No. 34-D, I. C. C. No. 1.98.

Item 50—Basis for Freight to and From Cairo, Metropolis, Ill., Evansville, Ind., and Helena, Ark.

To make rates to or from—	Add to rates to or from—	In cents per 100 pounds
Cairo, Ill.	East Cairo, Ky.	2
Evansville, Ind.	Henderson, Ky.	2
Helena, Ark.	Trotters Point, Miss.	2
Metropolis, Ill.	Paducah, Ky.	2

Rates of Freight in Cents per 100 Pounds Applying on Cottonseed, Carloads, Minimum Weight 30,000 Pounds

Item	From—	To—	Rates	Route No.
	M. & S. V. R. R.			
55	Benwood, Miss.	Grenada, Miss.	8.0	5
	Bruce, Miss.	Greenwood, Miss.	8.0	6
	Guma, Miss.	Jackson, Miss.	10.5	7
	Pittman, Miss.			
	I. C. R. R.			
60	Bradford, Tenn.	Birmingham, Ala.	11.0	1
	Grand Junction, Tenn.		11.0	
	Greenfield, Tenn.		11.0	
	Hickory Valley, Tenn.		11.0	
	Martin, Tenn.		12.0	
	Middleburg, Tenn.		11.0	
	Sharon, Tenn.		11.0	
	I. C. R. R.			
65	Mound City, Ill.	Cairo, Ill.	3.25	1
	C. & C. R. R.			
70	Carthage, Miss.	Jackson, Miss.	7.5	3
		Kosciusko, Miss.	8.0	3
	Edinburg, Miss.	Jackson, Miss.	7.5	3
		Kosciusko, Miss.	8.0	3

<sup>1</sup> Applicable only on Intrastate Traffic.



Item 75—Rates of Freight in Cents per 100 Pounds Applying on  
Cottonseed, Carloads, Minimum Weight 30,000 Pounds

From—	To—				
	Magnolia, Miss.	Brook- haven, Miss.	Hazlehurst, Miss.	Jackson, Miss.	Route No.
<b>F. C. &amp; O. R. R.</b>					
Barto, Miss	4.75	6.5	7.0	8.0	2
Beardens, Miss	4.75	6.5	6.5	8.0	2
Columbia, Miss	6.5	7.0	7.5	8.5	2
Davo, Miss	5.5	6.5	7.0	8.5	2
Hamage, Miss	6.5	7.0	7.5	8.5	2
Jennings, Miss	4.25	6.0	6.5	8.0	2
Kloto, Miss	5.5	6.5	7.0	8.0	2
Knorr, Miss	5.5	6.5	7.5	8.5	2
Kokomo, Miss	5.5	7.0	7.5	9.5	2
Mesa, Miss	5.5	6.5	7.0	8.0	2
Neb, Miss	6.5	7.0	7.5	8.5	2
Pitta, Miss	4.25	6.0	6.5	7.5	2
Sumbax, Miss	6.5	7.0	7.5	8.5	2
Tylertown, Miss	5.5	6.5	7.0	7.5	2
West Columbia, Miss	6.5	7.0	7.5	6.5	2

Rates of Freight in Cents per 100 Pounds, Except as Otherwise  
Provided Applying on Cottonseed, Carloads, Minimum Weight  
30,000 Pounds

Item No.	From—	To—	Rate (in cents per ton of 2,000 pounds)	Route No.
G. & S. I. R. R.				
80	Columbia, Miss	Jackson, Miss	6.5	7
G. M. & N. R. R.				
85	Jackson, Tenn	Memphis, Tenn	125	8
C. & C. R. R.				
90	Carthage, Miss	Laurel, Miss	189	13
	Edinburg, Miss		189	13
F. C. & O. R. R.				
95	Barto, Miss	Laurel, Miss	210	14
	Beardens, Miss		210	14
	Conerly, Miss		210	14
	Davo, Miss		210	14
	Fernwood, Miss		210	14
	Hamage, Miss		199	14
	Kloto, Miss		210	14
	Knorr, Miss		210	14
	Kokomo, Miss		199	14
	Lovell, Miss		199	14
	Mesa		210	14
	Neb, Miss		199	14
	Parrona, Miss		210	14
	Perdue, Miss		199	14
	Sumbax, Miss		199	14
	Tylertown, Miss		210	14
	Vaughts, Miss		210	14
	West Columbia, Miss		199	14

<sup>1</sup> Applicable only on Intrastate Traffic.

<sup>2</sup> Not subject to Rules Nos. 15 and 20 at intermediate points of origin and destination.

For Explanation of Route Nos., see page 12.



## Explanation of Routes

Route No.	Route
1	Via I. C. R. R. direct.
2	Via F. C. & G. R. R., Fernwood, Miss., and I. C. R. R.
3	Via C. & C. R. R., Canton, Miss., and I. C. R. R.
4	Via M. & S. V. R. R., Bruce Jct., Miss., and I. C. R. R.
5	Via M. & S. V. R. R., Bruce Jct., Miss., I. C. R. R., Grenada, Miss., and The Y. and M. V. R. R.
6	Via G. & S. I. R. R. direct.
7	Via G. M. & N. R. R., Dyersburg, Tenn., and I. C. R. R.
8	Via Miss. C. R. R., Brookhaven, Miss., I. C. R. R., Jackson, Miss., and The Y. and M. V. R. R.
9	Miss. Cent. R. R., Brookhaven, Miss., I. C. R. R.
10	Miss. Cent. R. R., Silver Creek, Miss., G. & S. I. R. R.
11	Miss. Cent. R. R., Hattiesburg, Miss., G. & S. I. R. R.
12	C. & C. R. R., Canton, Miss., I. C. R. R., Jackson, Miss., G. & S. I. R. R.
13	F. C. & G. R. R., Columbia, Miss., G. & S. I. R. R.
14	

17

## In United States District Court

[Title omitted.]

[File endorsement omitted.]

*Answer of Interstate Commerce Commission*

Filed April 21, 1942

Now comes the Interstate Commerce Commission, one of the defendants above named, by its counsel, and in answer to the complaint in this case respectfully represents:

1. The Commission admits the averments of paragraphs 1, 2, 3, 4, and 5 of the complaint.

2. The Commission denies the averments of paragraphs 6 and 7 of the complaint.

3. In further answer to the averments of the complaint, the Commission alleges that the plaintiff was accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings testimony and other evidence bearing upon the matters covered in its said reports and orders was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff by its counsel; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties to the proceeding before the Commission by their respective counsel, including the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceeding, including the plaintiff herein, its said reports and orders of May 3, 1940, and January 3, 1942; that said reports and orders included the Commission's findings of fact, conclusions,



and requirements in the premises; and that, upon the evidence  
aforesaid, and as shown in and by said reports, the Com-  
mission made the findings and stated the conclusions upon  
which its orders were based.

The Commission further alleges that said order of January  
3, 1942, was not made or entered either arbitrarily or unjustly  
or contrary to the relevant evidence or without evidence to sup-  
port it; that in making said order the Commission did not exceed  
the authority which had been duly conferred upon it; and the  
Commission denies each of and all the allegations to the contrary  
contained in the complaint.

Except as herein expressly admitted, the Commission denies  
each of and all the allegations contained in the complaint, insofar  
as they conflict either with the allegations herein or with the  
statements or conclusions of fact included in said report and order  
of January 3, 1942, referred to and made a part of the complaint  
as Exhibit A, which report and order is hereby referred to and  
made a part hereof.

All of which matters and things the Commission is ready to  
aver, maintain, and prove, and hereby prays that said complaint  
be dismissed.

INTERSTATE COMMERCE COMMISSION,  
By (s) DANIEL H. KUNKEL, *Attorney.*

DANIEL W. KNOWLTON,  
*Chief Counsel,*  
*Of Counsel.*

[Duly sworn to by J. Haden Allredge; jurat omitted in  
printing.]

In United States District Court

[Title omitted.]

*Answer of defendant railroad companies*

Come now the Illinois Central Railroad Company, and J. M.  
Kurn and John G. Lonsdale, Trautees, St. Louis-San Francisco  
Railway Company, Debtor, defendants answering the original  
complaint herein and say:

1. Defendants herein named admit the allegations in the first  
paragraph of the original complaint.

2. Defendants herein named admit the allegations in the sec-  
ond paragraph of the original complaint.

3. Defendants herein named admit the allegations in the third  
paragraph of the original complaint.



4. Defendants herein named admit the allegations in the fourth paragraph of the original complaint.

5. Defendants herein named admit the allegations in the original complaint contained in paragraph five, except those allegations and statements hereinafter specifically denied, to wit:

"The tariff in question, Exhibit 'C' hereto and made a part hereof, provides for the equalization of its outbound rates with those of plaintiff's intervening trunk-line competitors. The tariff provision does not affect the amount of rates paid for the inbound movement of cottonseed to the mill point. Its effect is to reduce the outbound rate on cottonseed products to meet competitive condition created by so-called 'cut-back rates' of trunk line competitors, which 'cut-back' rates tend to hold the outbound movement of cottonseed products from mill points to the lines of said competitors. The facts with reference to a typical movement is quoted in Exhibit 'A' at pages 4 and 5 thereof."

6. The defendants herein named deny each and every  
21 allegation in paragraph six of the original complaint.

7. The defendants herein named deny each and every allegation in paragraph seven of the original complaint.

8. In further answer to the averments of the complaint, the defendants, the Illinois Central Railroad Company, and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, alleges that the plaintiff was accorded proper notice and a full opportunity to be heard, that the order complained of was entered by the Interstate Commerce Commission upon proper evidence that the resulting order is reasonable and lawful.

Wherefore, the defendants herein named prays judgment that the original complaint of the plaintiff be dismissed.

ILLINOIS CENTRAL RAILROAD COMPANY,  
J. M. KURN AND JOHN G. LONSDALE,  
TRUSTEES, ST. LOUIS-SAN FRANCISCO  
RAILWAY COMPANY, DEBTOR.

By (s) JOHN E. McCULLOUGH, *Their Attorney.*

[Duly sworn to by John E. McCullough; jurat omitted in printing.]



## INTERSTATE COMMERCE COMMISSION

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Investigation and Suspension Docket No. 4599

### ALLOWANCES ON COTTONSEED AT COLUMBUS & GREENVILLE RAILWAY POINTS

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Submitted October 4, 1939. Decided May 3, 1940

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Proposed allowances by the Columbus & Greenville Railway Company to shippers who use its line for the out-bound movement of cottonseed products, manufactured from cottonseed moving into mill points by lines of other rail carriers, found unlawful. Suspended schedules ordered canceled. Respondent cited to show cause why its tariff I. C. C. No. 81, containing provisions similar to those in the suspended tariff, should not be amended so as to eliminate such provisions.

R. C. Stovall and Z. P. Hawkins for respondent.

M. G. Roberts, Rufus Creekmore, and Nathan S. Sherman for protestants.

#### REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS MAHAFFIE, MILLER AND ALLDREDGE.

#### BY DIVISION 3:

Exceptions to the report proposed by the examiner were filed by respondent, and the proceeding was orally argued. Our conclusions differ in certain respects from those recommended in the proposed report.

By schedules filed to become effective March 5, 1939, the Columbus & Greenville Railway Company, sole respondent herein, proposes to make certain allowances to shippers who use its line for the out-bound movement of cottonseed products from Columbus, Greenville, Greenwood, Indianola, Moorhead, and West Point, Miss. Upon protest of the Mobile and Ohio Rail Road Company (C. E. Ervin and T. M. Stevens, receivers) and the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, trustees), hereinafter called the Mobile & Ohio and the Frisco, respectively, operation of the schedules was suspended until October 5, 1939. Respondent has further postponed the effective date pending disposition of this proceeding. Rates and allowances will be stated in cents per 100 pounds.



Respondent's line extends from Columbus to Greenville, 168 miles. It connects with lines of the Southern Railway Company, the Mobile & Ohio, and the Frisco at Columbus, with lines of the Illinois Central Railroad Company and the Mobile & Ohio at West Point, and with lines of The Yazoo and Mississippi Valley Railroad Company at Greenville, Greenwood, and Moorhead. Cottonseed mills are located at each of these junctions and are served by respondent and the other lines. The record indicates that the mill at Greenwood is reached by respondent's rails exclusively, and that in-bound and out-bound traffic is switched between the mill and the rails of the Yazoo & Mississippi Valley by respondent. The record does not show, however, what respondent's switching charge is for this service or whether such charge is absorbed by the Yazoo & Mississippi Valley. There is also a mill at Indianola, which point is local to the Columbus & Greenville. Lines of the Illinois Central and the Gulf, Mobile and Northern Railroad Company also intersect respondent's line at Winona and Mathiston, Miss., respectively.

The suspended schedules are contained in respondent's tariff I. C. C. No. 83, which, but for the suspension, would have canceled its tariff I. C. C. No. 81 containing similar provisions. The latter tariff was neither protested nor suspended, and it became effective October 16, 1938. It was subsequently criticized by our Bureau of Traffic as being unlawful in certain respects, and respondent was requested to correct it. The schedules now under investigation were thereafter filed. The suspension of these schedules left I. C. C. No. 81 in effect, and it has not since been changed. The suspended tariff differs from the prior tariff only as to form. The result intended to be accomplished by both is the same, namely, the payment by respondent of specified allowances, or refunds, to shippers who use its line for the out-bound movement of cottonseed products. The responsibility for these tariffs rests solely on the Columbus & Greenville, no other carrier having concurred in their provisions.

Tariff I. C. C. No. 83 provides that when cottonseed, in carloads, is moved by rail into any of the above-mentioned manufacturing or mill points, at the full local or joint rates applying thereto, for cracking, crushing, delinting, or other manufacturing process, and the product is subsequently shipped from such point, in carload or less-than-carload quantities, over respondent's line, respondent will make to the shipper at such manufacturing or mill point, through claim channels, an allowance determined in accordance with the provisions of the tariff, if the conditions specified therein are met. The principal conditions are that the cottonseed products must be shipped out-bound by way of the Columbus & Greenville within 1 year from the date of the in-



bound freight bill, at the rate from the mill point to final destination, and that the claim for refund must be filed within 15 months from the date of the out-bound shipment, supported by the original paid freight bill covering the in-bound movement, a copy of the out-bound bill of lading, and a certificate that the claim is bona fide.

There is no requirement that the in-bound shipment move to the mill point over respondent's line, either wholly or in part, the only provision in this respect being that the in-bound shipment move "via rail." Therefore, the tariff would apply even though the in-bound shipment moved entirely over the line of some other carrier to the mill point. No origins or destinations are specified in the tariff.

The refund provided by the tariff is the difference between the rate paid on the in-bound shipment of the cottonseed and the "factors" specified in the tariff, which factors range from 2.75 to 8.5 cents for in-bound distances of from 5 to 170 miles. For example, on a shipment of cottonseed over the Yazoo & Mississippi Valley from Coahoma, Miss., to Greenville, 87 miles, the in-bound rate would be the local rate of that carrier of 8.4 cents. The factor provided in respondent's tariff for that distance is 7 cents. The refund would be the difference between that factor and the local in-bound rate of 8.4 cents paid by the shipper, or 1.4 cents per 100 pounds, applied to the weight of the out-bound shipment, but not exceeding 93 percent of the weight of the in-bound shipment. The tariff is not applicable on Mississippi intrastate traffic. Respondent explained this was due to the fact that under the law of that State an intrastate tariff may not be made effective unless it is approved in advance by the Mississippi Public Service Commission, which commission declined to approve respondent's similar prior issue, I. C. C. No. 81. As respondent's line is wholly within the State of Mississippi, it is obvious that traffic moving exclusively over its line is intrastate in character. In order to be interstate in character, a shipment originating on respondent's line must subsequently move over some other line or lines.

Under cut-back tariffs maintained by the Frisco, the Mobile & Ohio, and the Yazoo & Mississippi Valley, the aggregate charges for the in-bound and out-bound movements are at present lower when the out-bound movement is over one of those lines than they are when the out-bound movement is over the Columbus & Greenville. Respondent contends, therefore, that the refunds contemplated by the suspended schedules are necessary to enable it to compete effectively for the out-bound traffic. Respondent's tariff is so constructed that the aggregate net amount payable by the shipper for the in-bound and out-bound movements would be



the same as the amount the shipper would pay if his traffic were handled both in and out of the manufacturing point by one of the trunk lines. Respondent shows, for example, that on a shipment of cottonseed from Coahoma over the Yazoo & Mississippi Valley to Greenville, processed there, and the product, cottonseed oil, shipped over the line of the same carrier and its connections to Cincinnati, Ohio, a representative destination, the aggregate of the rates would be 55 cents, composed of an in-bound cut-back rate of 7 cents to Greenville plus a joint rate of 48 cents from Greenville to Cincinnati. The Yazoo & Mississippi Valley would collect, at the time of the in-bound shipment, its local rate from Coahoma to Greenville of 8.4 cents, and after the movement of the out-bound shipment over its line and compliance with the other terms of its cut-back tariff, it would refund the difference between its local rate and its cut-back rate, or 1.4 cents. If the cottonseed oil were shipped from Greenville over respondent's line and its connections, the aggregate of the rates under respondent's suspended tariff would also be 55 cents, composed of the Yazoo & Mississippi Valley's in-bound local rate of 8.4 cents for the movement from Coahoma to Greenville, plus a joint rate of 48 cents for the movement from Greenville to Cincinnati, which latter rate would be reduced by the proposed allowance, 1.4 cents, to 46.6 cents.

Cut-back tariffs of the Frisco, the Mobile & Ohio, and the Yazoo & Mississippi Valley, which are virtually identical, differ from respondent's suspended "allowance" tariff in several important respects. Under each of the former both the in-bound and the out-bound movement must be over the line of the same carrier, the one publishing the arrangement. For example, the Frisco tariff applies on cottonseed originating at points which are on its line and moving to mill points which are on its line, but which may be served also by other lines, for cracking, crushing, delinting, or other process, and for reshipment beyond the mill point over the Frisco. The tariff provides that the rates named therein (called cut-back rates) must not be used in way-billing shipments, that all shipments must be waybilled at the local rate to the mill point, and that the freight charges will be collected at that rate upon delivery at the mill point. It further provides that if the out-bound shipment from the mill point is over the Frisco, the freight charges to the mill point will be reduced, through claim channels, to the basis of the lower cut-back rates named therein, on basis of a ratio of 100 pounds of cottonseed in-bound for each 93 pounds of products out-bound. If a shipment of cottonseed were to move over the Frisco to Columbus and the out-bound product over the Columbus & Greenville, or the Southern, or the Mobile & Ohio, the Frisco's cut-back



rates would not be applicable. Nor would they be applicable if the in-bound shipment moved into Columbus over any other line, even though the out-bound movement were over the Frisco. The tariffs of the other railroads in Mississippi, except the Columbus & Greenville, are similar to those of the Frisco.

Transit and similar arrangements, such as provided by these cut-back tariffs, are generally conditioned upon, or granted in consideration of, the obtaining of the out-bound haul of the product by the in-bound carrier to the transit point. Under respondent's suspended schedules, however, the refunds therein provided are made without regard to whether the in-bound shipment is over its line or over the line of any particular carrier, the only requirement being that the in-bound shipment move by rail. It is clear that respondent's tariff would apply whether the in-bound movement is over its line or over the line of any other rail carrier reaching the mill point. Prior to the publication of its tariff I. C. C. No. 81, respondent maintained tariffs providing for cut-back rates under conditions similar to those contained in the cut-back tariffs of the trunk lines. Its situation then was not essentially different from that of the other lines. Then, under its cut-back tariffs, the cut-back rates were applicable only when both the in-bound and the out-bound movements were over its line, and when this condition was not met there was no cut-back, the local in-bound rate originally collected being retained. This is also true of the cut-back tariffs of the trunk lines then and now in force. If, for example, an in-bound shipment to Greenville moved over respondent's line, the cut-back tariff of the Yazoo & Mississippi Valley would not apply, and if the out-bound shipment moved over the line of that carrier the aggregate charges would be higher than they would be if the out-bound shipment moved over respondent's line. Each of the other carriers is at a similar disadvantage since the cut-back tariff of each is inapplicable where the out-bound shipment is over a line other than that of the in-bound carrier. Respondent's tariff I. C. C. No. 81 for the first time provided for cut-backs, even though the in-bound movement was over another line. That tariff and its succeeding issue now under suspension are unique in this respect. Instead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier.

Cut-back tariffs applicable to the movement of cottonseed and its products in Mississippi were first published by the trunk lines and by respondent in 1931 and were for the purpose of meeting truck competition. The cut-back rates then established were



soon found to be too high to meet truck competition effectively, and on February 1, 1932, and again on September 20, 1933, they were reduced. On August 1, 1934, the normal cottonseed rates were reduced to a basis only slightly higher than the cut-back rates, in a further effort to meet truck competition, and these rates, as subsequently increased 5 percent, are still in effect. Throughout the period since 1931 respondent has maintained the same basis of rates over its line as those in force on the trunk lines. Protestants point out that the cut-back rates are extremely low, averaging only about 8.5 percent of the first-class rates, whereas in the general cottonseed proceeding the Commission prescribed 18.5 percent of first class as reasonable, and that these low cut-back rates can be justified only in consideration of the in-bound carrier's obtaining the out-bound movement.

There has been a marked decline in respondent's cottonseed traffic during recent years. In 1928, 1929, and 1930 the out-bound movements of cottonseed products over its line totaled 92,819, 111,254, and 91,678 tons, respectively, averaging 95,250 tons, while the average for the 7 years 1932-1938 was 37,689 tons. It ascribes this decrease not to economic conditions, but to the existence of the trunk lines' cut-back tariffs. But there is no clear showing that this decrease was due solely to the existence of the trunk lines' cut-back tariffs, and nothing to indicate that their traffic increased. Those tariffs were not made effective until near the end of the year 1931 (November 2), yet respondent's out-bound cottonseed-products traffic declined in that year to 49,226 tons from 91,678 tons in the previous year. There is no showing whether in that year or in subsequent years the competing trunk lines' cottonseed-products traffic increased or decreased. For aught that appears their traffic might have decreased in the same proportion as respondent's. Moreover, there has been a steady decline in the in-bound movement of cottonseed over respondent's line. That traffic, after increasing from 20,774 tons in 1928 to 26,801 tons in 1929, steadily declined until it reached the low figure of 3,949 tons in 1938. Respondent did not show how much of this traffic was lost because of truck competition. Further, there has been a substantial decline in the rail movement of cottonseed on all class I railroads in the southern region and in the United States since 1930. The tonnage in the southern region in 1930 was 1,407,778 tons and in the United States 2,599,872 tons, whereas in 1937 the tonnages were 582,916 in the southern region and 1,266,881 in the United States, or 41.4 percent and 48.7 percent, respectively, of the 1930 movement.

Comparatively little cottonseed is produced along respondent's line, and most of the in-bound cottonseed originates on and moves over the lines of other carriers, particularly the Illinois Central,



the Yazoo & Mississippi Valley, the Mobile & Ohio, and the Frisco. There appears to be a substantial in-bound movement by truck. Respondent's disadvantage appears to be primarily one of location. Respondent, however, has equal right with the trunk lines to compete, by lawful means, for the out-bound traffic. The out-bound cottonseed-products traffic is free traffic, and no particular carrier has any inherent right to it. As stated in *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768, there is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates. The right of a carrier to compete for traffic, however, is conditioned upon the use of legal means to accomplish that purpose.

By their terms, the cut-back tariffs of the trunk lines reduce only their own in-bound local rates. The suspended tariff must be interpreted as affecting only the out-bound rate in instances where respondent has not participated in the in-bound haul. The effect of it, as to most of the considered traffic, is to reduce the lawfully published out-bound rate without the concurrence of other carriers participating in the out-bound haul.

Refunds contemplated by the suspended schedules, although denominated allowances, are not allowances within the meaning of the term "allowance" as used in section 15 (13) of the act, because the shippers or owners of the traffic do not perform any part of the transportation service.

The suspended schedules do not lawfully name or provide any legal rates whatsoever. Although the refunds vary with the distances the in-bound shipments move, respondent cannot lawfully name, or vary, the in-bound rate where the in-bound shipment moves over some other line, and the in-bound line does not concur in respondent's tariff. In order to make a lawful joint rate with other carriers, their concurrence is necessary under the Commission's tariff regulations, and under section 6 (4) of the act, which reads:

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence or concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

Joint rates on cottonseed products are in effect from origins on respondent's line to destinations reached by connecting carriers, and there is no question but that such joint rates are properly concurred in by all participating carriers. The Columbus & Greenville, acting alone, cannot reduce such joint rates.



In substance and effect, the suspended tariff attempts to do just this. It provides for certain refunds to the shipper, which if made would result in the traffic being transported from the mill point to a destination on another line at a net rate lower than the joint rate legally in effect and published in other tariffs. For example, the joint rate of 48 cents from Greenville to Cincinnati applies over the route formed by the Yazoo & Mississippi Valley, the Illinois Central, and the Southern Railway lines, by way of Memphis. It also applies over the route formed by respondent's line to Columbus and Southern Railway lines beyond; also over respondent's line to Columbus, the Frisco to Birmingham, and Southern Railway lines beyond. Under respondent's suspended tariff the shipper at Greenville, for instance, if he surrendered a Yazoo & Mississippi Valley freight bill covering an in-bound shipment from Coahoma, would obtain transportation from Greenville to Cincinnati, over either of the last-mentioned routes, at 46.6 cents, instead of at the joint rate of 48 cents, concurred in by respondent and the several other carriers participating in the out-bound movement. In other instances the lawfully applicable out-bound joint rates would be defeated by amounts ranging from 0.95 to 3.15 cents per 100 pounds.

Under the decision of the Supreme Court in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, a carrier may provide for a transit privilege on its line by its individual tariff and without the concurrence of other carriers. The Court held, at page 255:

"Under the rules of the Commission governing the making, filing and publishing of tariffs, privileges like creosoting in transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of and without consulting, connecting carriers. And the whole revenue received for use of the privilege is retained by the local carrier."

Based on the foregoing decision, the Columbus & Greenville would have the right to provide for a transit arrangement on its line. It could provide for the stopping of the commodity at the transit point and the subsequent shipment at the lawfully established joint through rate from original point of shipment to final destination, without the concurrences of its connections, but it could not establish the joint rate itself without such concurrences.



In several instances the Commission has approved varying proportional rates applicable over a line serving a transit point, but not reaching the origin territory, where the purpose was to equal the balances of the through rates applicable under transit arrangements of carriers originating the traffic and with lines both into and out of the transit point. Export Rates on Grain and Grain Products, 31 I. C. C.

Section 6 (1) of the act provides that every common carrier subject thereto shall file with the Commission and print and keep open to public inspection schedules showing all the rates for transportation not only between "different points on its own route" but also "between points on its own route and points on the route of any other carrier by railroad, \* \* \* when a through route and joint rate have been established." Section 6 (4) quoted above, requires concurrences of all participating carriers in joint tariffs. Section 6 (7) provides, among other things, that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates \* \* \* which are specified in the tariff filed and in effect at the time", and, further, that no carrier shall "refund or remit in any manner or by any device any portion of the rates \* \* \* so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." The word "tariffs" as used in section 6 (7) must be interpreted as meaning joint tariffs, when considering joint rates. Such an interpretation is necessary to the proper administration and enforcement of the act, in order to prevent a single carrier, party to a joint rate, from varying such joint rate by publication of a refund, as in the present proceeding, or possibly by the publication of a different rate, in its individual tariff.

In our opinion the allowances proposed by respondent would constitute a "device" by means of which it would refund a portion of the rates specified in joint tariffs now lawfully on file with the Commission. The fact that the refund would be made out of respondent's division of the joint rate would be immaterial. Such a refund would be, essentially, a rebate, whereby the property would be transported from the mill point to the destination on another line at a lower rate than that named in the joint tariff published and filed by the several carriers participating in the movement and lawfully in effect. The rates in effect generally on this traffic in the Southeast are those prescribed by the Commission in Cottonseed, Its Products, and Related Articles, 188 I. C. C. 605, and subsequent reports, subjected



to later general increases authorized in the light of the need of the carriers for additional revenue. In some instances they have subsequently been reduced. Respondent's suspended tariff, granting an alleged allowance to the shipper notwithstanding that he performs no part of the transportation service, as the result of which he would obtain the out-bound transportation at less than the rates lawfully in effect would constitute an unreasonable practice, in violation of section 1 (6) and other provisions of the Interstate Commerce Act.

If respondent's suspended issue could be found lawful, it would follow that similar tariffs published by the trunk lines serving the mill points would likewise be lawful. The result would be, if such action were taken, that the advantage gained by respondent from its tariff would be substantially offset by similar action of the competing lines, and all the carriers would then transport out-bound traffic at lower rates than those now lawfully in effect.

The cut-back rates and tariffs of the trunk lines are not here in issue, and nothing in this report is to be construed as either approving or condemning them.

We find that, if permitted to become effective, the proposed allowances, to the extent that they apply where the traffic has been moved to the mill points by rail carriers other than respondent, would be in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act and are therefore unlawful. The suspended schedules, so far as they pertain to traffic originated by respondent and moved to the mill point over its line, although not found unlawful on this record, are defective in their present form. The tariff is so constructed that the unlawful provisions thereof cannot be segregated from those which might otherwise be found lawful. It must therefore be condemned in its entirety. An order will be entered requiring cancelation of the suspended schedules.

As respondent's tariff I. C. C. No. 81 contains substantially the same provisions as the suspended schedules so far as traffic moved into the mill points by other lines is concerned, a provision will be included in the order citing respondent to show cause why its I. C. C. No. 81 should not be amended so as to eliminate such provisions.



## In United States District Court

No. 161

COLUMBUS &amp; GREENVILLE RAILWAY COMPANY

v.

THE UNITED STATES OF AMERICA, ET AL.

## THREE JUDGE COURT

Before HOLMES, Circuit Judge, and DAWKINS and MIZE, District Judges.

*Opinion* ✓

July 31, 1942

MIZE, District Judge.

The validity of the order of the Interstate Commerce Commission requiring the plaintiff, C. & G. Railway Company, to cancel certain provisions of a cut-back rate tariff is posed for determination by this suit. The Commission found plaintiff's freight tariff 2-B I. C. C. No. 81 to be in violation of sections 1 (6), 6 (4), and 6 (7) of the Interstate Commerce Act. The basis for the Commission's action is contained in two reports, being I. & S. Docket No. 4599, 238 I. C. C., 309, and No. 28590 decided January 3, 1942. The last mentioned report being the one that is particularly in controversy, the record and report of the former being made part of the record in the latter.

The facts in the case are not in dispute. The tariff provisions which the Commission has condemned, provide that when cottonseed is transported by a railroad other than the C. & G. Railway Company to a mill point and is there processed and its products subsequently reshipped over the line of C. & G. Railway Co., the C. & G. Railway Co. will make a prescribed refund to the shipper, based upon the inbound shipment and the length of movement from the origin to milling point. This provision is contained in plaintiff's tariff No. 81, being Item 5 thereof, and which provides that it shall be applicable on cottonseed in carloads from stations on the C. & G. Railway and on cottonseed from stations on connecting lines via such lines to mill points on the C. & G. Railway where in both cases subsequent shipment of the product is made from such mill points via the C. & G. Railway. Item 29 40 of the tariff provides for a scale of rates based upon the distance of the inbound movement.

The effect of this tariff is that the schedule of rates prescribed is used as a measure for making refunds on the subsequent reshipments of the product out of the mill point and is not



applied in the first instance upon the inbound movements. On inbound movement a local rate is charged and collected and subsequently upon shipment out of the mill point over the C. & G. Railway the C. & G. Railway Company refunds to the shipper the difference between the local rate inbound and the rate prescribed in tariff No. 81, depending upon the length of the inbound movement. This tariff is applied on all inbound movements by rail, whether such transportation is performed by the C. & G. Railway Company or any other carrier serving the mill point. The line of the C. & G. Railway Co. lies wholly within the State of Mississippi. Movement of cottonseed products from any of the mill points on its lines to points outside of the State of Mississippi involves movement over the line of the C. & G. Railway and the connecting carrier. The C. & G. Railway Co. has joint rates on cottonseed products in effect from origin on its line to destination reached by connecting carriers, and such joint rates are properly concurred in by all participating carriers.

The report of the Commission shows that the investigation was instituted upon its own motion concerning the lawfulness of the rates. The St. Louis-San Francisco Railway Co. and the I. C. Railroad Co., competitors of the C. & G. Railway Co., intervened in the hearing. Each of these interveners has a tariff substantially identical with the tariff of plaintiff, except that the tariff of each of these provides for a cut-back only upon cottonseed products processed from cottonseed originating inbound on the lines of such carrier. The rates for the inbound movements of cottonseed are published in tariffs local or joint governing the movement to the mill point. The rates on  
30 cottonseed products from the mill point are published in tariffs local or joint governing the movement from the mill point.

It is the contention of the plaintiff that the rate provided in the tariff is reasonable, just, not discriminatory, and that it is necessary in order to meet the competition of the trunk line carriers, and that the amount of freight paid by the shipper when moving outbound products over plaintiff's line is identically the same as it would be if the products moved out over its competitors' lines; that unless this tariff is permitted to stand, plaintiff, of course, is unable to meet the rate in effect by its competitors; that the processed products of the cottonseed became free freight at the mill points and the plaintiff is entitled to compete for free freight upon substantially equal terms with its competitors. That tariff No. 81 is not a joint tariff.

Interveners object to the tariff upon the theory that it attempts to name rates for account of their lines without their concurrence. That (1) their tariffs apply solely on shipments of



cottonseed which they transport over their lines to the mill point; (2) to permit plaintiff's tariff to remain would in effect permit it to charge a less rate than that shown by its joint tariff and without concurrence of those carriers concurring in the joint rate.

The testimony shows without dispute that this tariff is profitable to plaintiff; that by its provisions and enforcement none of the capital investment of plaintiff is impaired; that the connecting carriers receive the entire proceeds from the rates as published applicable to them; and that plaintiff absorbs the entire amount of this cut-back. The testimony shows too that it does not vary in any respect whatsoever from the published tariff.

The tariff sets up a procedure by which the shippers of the outbound products are required to file through the claim channels of plaintiff the original bill of lading upon the inbound cottonseed within fifteen months and that then, in accordance with this tariff, the refund is made. The Commission did not find that the tariff was unreasonable, unjust or discriminatory, but determined that the form and manner in which the tariff is published does not conform to the requirements of Section 6 (4) and 6(7) of the Act, and that it was unlawful by virtue of Section 1 (6) of the Act. The Commission was without power to declare the tariff unlawful unless it found from the evidence as a fact that the tariff was in violation of 6 (4) or 6 (7) or otherwise violated 1 (6).

The court is without power to review the Commission's conclusions of fact. *Interstate Commerce Commission v. Delaware, etc. Railway*, 220 U. S. 235. The legal effect of evidence, however, is a question of law, and when there is no dispute in the facts, the matter is then to be determined by the court as a matter of law. *Interstate Commerce Commission v. L. & N. Railway Co.*, 227 U. S. 88; *U. S. v. C. M., St. Paul & Pacific Ry. et al*, 294 U. S. 499. The carrier retains the primary right to make rates but if after a hearing they are shown to be unreasonable, it is then the duty of the Commission to set them aside and require the substitution of just for unjust rates. *Interstate Commerce Commission v. L. & N.*, *supra*.

The purposes of the Interstate Commerce Act are clearly stated in *Interstate Commerce Commission v. B. & O. Railway Co.*, 145 U. S. 265. Among others mentioned, one of the purposes was to prohibit unjust discrimination in the rendition of like service under similar circumstances and conditions, and to prevent undue or unreasonable preference to persons or localities, but that it was not designed to prevent competition between different roads, and that it was not all discriminations or preferences that fall within the inhibition of the statute, only such as are unjust or unreasonable.



The freight that was sought to be captured by plaintiff's tariff was free freight and plaintiff, by any lawful means, had the right to endeavor to receive it. *Atchison T. & S. F. Ry. Co. v. U. S.*, 279 U. S. 768. Under this authority the competitors of

32 plaintiff had no more right to recapture the freight because they brought the cottonseed in than does plaintiff have the equal right to compete for it upon equal terms. The shipper is entitled to a free choice of carriers upon substantially the same terms. In *T. & P. Ry. Co. v. Interstate Commerce Commission*, 169 U. S. 197, the court stated: "The traffic thus secured was remunerative to the Railway Company and was obviously beneficial to the consumers at the place of destination, who were those enabled to get their goods at lower rates than would prevail if this custom of through rates were destroyed.

\* \* \* The Commission did not charge, or find that the local rates charged by the defendant company were unreasonable. \* \* \* The very terms of the statute that charges must be reasonable, that discrimination must not be unjust, or that preference or advantage to any particular person, firm, corporation or locality must not be undue or unreasonable necessarily implied that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act." Carriers have a right to initiate rates as long as they do not violate the terms of the Act. The Act itself leaves common carriers as they were at the common law. They make special rates looking to the increase of their business, as long as they publish and file their rates and otherwise conform to the Act of Congress. *Interstate Commerce Commission v. C. G. M. Ry. Co., et al*, 209 U. S. 108; *U. S., et al v. I. C. Ry. Co., et al.*, 263 U. S. 515; *U. S., et al. v. C. M., St. Paul & Pacific Ry. Co., et al.*, 294 U. S. 499. The plaintiff, by publishing the condemned tariff, was not seeking any advantage. It was only seeking equality in order that the shipper might have a choice of routes to be determined by him upon a substantial equality. His good faith in this respect was not questioned. His motive was

33 pure. Without this tariff his right to compete for this outbound freight is destroyed. "The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions and that such action does not amount to undue discrimination." *T. & P. v. U. S.*, 289 U. S. 627. The report of the Commission states: "The purpose of making the refund is to enable it to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating



lines held themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move outbound products over their lines. If it were not for the cut-back rates on the connecting lines, there would be no necessity for respondent's tariff, as the inbound shipments move from origin points to the mills at the local rates under separate bills of lading." The report states further that the refunds or cut-back are exactly the same in amount as those of the other carriers serving the mill points. The report further states that the legality of the interveners' tariffs is not in issue.

We think the legality of the interveners' tariffs, while not necessarily in issue, is very material to a correct solution of the validity of the plaintiff's tariffs. The legality of interveners' tariffs is not questioned by anyone and it is assumed that they are valid until declared invalid. They have been in existence since 1931 and were adopted by the competitors for the purpose of meeting truck competition, as is shown by the report of the Commission, Division 3, in Docket No. 4599, I. & S. D. No. 459.

A clear analysis of plaintiff's tariff demonstrates that it in no wise affects the amount of the rates paid for the inbound service to the mill point. It does not affect the outbound rate of connecting carriers. But the refund is absorbed entirely by the plaintiff. There is no other carrier a party to plaintiff's condemned tariff. The tariff, in substance, is essentially the same as that of the intervening trunk lines, and if it were not  
34 for those tariffs of the intervening trunk lines, then there would be no necessity for the plaintiff's tariff, and probably it never would have been promulgated.

Shippers pay the full amount of freight as published on the inbound movements over any of the roads. Likewise on the outbound movements the full amount of freight is paid and by the terms of the tariff is in no way affected. The effect of the condemned tariff is that when the processed products are shipped over C. & G.'s road, it will absorb a part of the inbound freight charges as published by its tariff, upon compliance with the procedure therein contained. The plaintiff is therefore entitled to the relief sought.

Appearances: Forrest B. Jackson, Jackson, Mississippi, R. C. Stovall, Columbus, Mississippi, Z. P. Hawkins, Columbus, Mississippi, Counsel for Columbus & Greenville Ry. Co.; Daniel H. Kunkel, Office of Chief Counsel Interstate Commerce Commission, Washington, D. C., Counsel for Interstate Commerce Commission; Robert L. Pierce, Special Attorney, Department of Justice, Washington, D. C., Counsel for United States of America; John E. McCullough, 1025 Frisco Building, St. Louis, Missouri, Counsel for



St. Louis-San Fran. Ry. Co.; Erle J. Zoll, Jr., 135 E. 11th Place,  
Chicago, Illinois, Counsel for Illinois Central R. R. Co.

GULFPORT, MISSISSIPPI, July 31, 1942.

35 In District Court of the United States for the Northern  
District of Mississippi, Eastern (Aberdeen) Division

Civil Action 161

COLUMBUS & GREENVILLE RAILWAY COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

*Final decree*

August 17, 1942

This cause came on this day for final hearing before the Honorable Edwin R. Holmes, a judge of the United States Circuit Court of Appeals for the Fifth Circuit, the Honorable Ben C. Dawkins, United States District Judge for the Western District of the State of Louisiana, and the Honorable Sidney C. Mize, United States District Judge for the Southern District of the State of Mississippi, and designated as a District Judge for the Northern District of Mississippi, composing a Three-Judge Court under the provisions of the Urgent Deficiencies Act, and particularly under the provisions of Title 28 U. S. C. A., Section 47, said Court having been heretofore organized by a precedent order herein heretofore entered, and said court having heretofore herein heard said matter on application for temporary restraining order and interlocutory injunction, and having heretofore ordered and directed the issuance of an interlocutory injunction against the defendants named in the original complaint herein, and said cause having now come on for final hearing filed by the Columbus & Greenville Railway Company, a railway common carrier corporation organized and existing under and by virtue of the laws of the State of Mississippi, with its domicile at Columbus, within the Northern District of the State of Mississippi, and upon legal process duly and legally served, as required by law, upon the defendants, the United States of America, the Interstate Commerce Commission, the Illinois Central Railroad Company and the St. Louis-San Francisco Railway Company, Debtor (J. M. Kurn and John G. Lonsdale, Trustees), and upon the answers of each of said defendants herein filed, and



36 upon final hearing, the Court having heard oral and documentary evidence in open court, all of the parties being present and represented by counsel, and the matter having been submitted to the Court upon the pleadings and upon oral and documentary evidence, and briefs for all the parties, and the court having now fully and finally considered and heard all of said matters, being fully advised in the premises, is of the opinion that the permanent injunction prayed for by the plaintiff should be, and the same is hereby granted, allowed and ordered.

It is, therefore, ordered, adjudged and decreed that the temporary and interlocutory injunction heretofore ordered, issued herein be, and the same is hereby made permanent.

It is further ordered, adjudged and decreed that the order of the Interstate Commerce Commission set forth in Exhibit "A" to the original complaint herein, and being that order of said Commission dated in Washington, District of Columbia, on January 3, 1942, in Interstate Commerce Commission Docket No. 28590 (Cottonseed Allowances of Columbus & Greenville Railway Company), effective February 26, 1942, and later extended as to effective date on timely application of plaintiff to April 28, 1942, be, and the same is hereby permanently restrained and enjoined from further effect and operation, and the United States of America, the Interstate Commerce Commission, the Illinois Central Railroad Company, and the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees), their officers, agents, servants, employees, attorneys, subsidiaries, affiliates, associates and all other persons whatsoever, are here and now permanently and forever restrained and enjoined from taking any other or further action under, or making any other or further attempt to enforce the provisions and requirements of said order in said Interstate Commerce Commission Docket No. 28590.

37 It is further adjudged, ordered and decreed that the interveners, I. C. Railroad Company and the trustees of the St. Louis & San Francisco Ry. Co. be taxed with costs herein, for which execution may issue, and all other proper and necessary writs are allowed.

Ordered, adjudged, and decreed, this the 17th day of August A. D. 1942.

EDWIN R. HOLMES,  
*United States Circuit Judge.*

BEN C. DAWKINS,  
*United States District Judge.*

S. C. MIER,  
*United States District Judge.*



- 38 In District Court of the United States for the  
Northern District of Mississippi, Eastern Division

[Title omitted.]

*Petition for appeal*

Filed Oct. 14, 1942

The Interstate Commerce Commission, J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, feeling themselves aggrieved by the final decree of the District Court for the Northern District of Mississippi, Eastern Division, entered August 17, 1942, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said defendants pray that a transcript of the record, proceedings and papers upon which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated October 14, 1942.

(s) DANIEL W. KNOWLTON,  
*Chief Counsel.*

(s) DANIEL H. KUNKEL,

39

(s) JOHN E. MCCULLOUGH,

*For J. M. Kurn and John G. Lonsdale,  
Trustees of the St. Louis-San Francisco Railway Company.*

(s) ERLE J. ZOLL, Jr.,

*For Illinois Central Railroad Company.*

[File endorsement omitted.]

- 40 In District Court of the United States for the  
Northern District of Mississippi, Eastern Division

[Title omitted.]

*Assignment of errors*

Filed Oct. 15, 1942

Come now the Interstate Commerce Commission, J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company and the Illinois Central Railroad Company, defendants herein, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to



the Supreme Court of the United States herewith petitioned for in said cause for the decree of the District Court of the United States for the Northern District of Mississippi, Eastern Division, entered on the 17th day of August 1942.

1. The Court erred in finding that Plaintiff, by publishing the condemned tariff, was not seeking any advantage but was only seeking equality.

2. The Court erred in finding that without this tariff plaintiff's right to compete for this outbound freight is destroyed.

3. The Court erred in holding that interveners' tariffs are very material to a correct solution of the validity of the plaintiff's tariff.

4. The Court erred in holding that plaintiff's tariff does not effect the outbound rate of connecting carriers.

5. The Court erred in finding that plaintiff's tariff is  
41 essentially the same as those of the intervening lines.

6. The Court erred in holding that the outbound freight rate is in no way affected by the terms of plaintiff's tariff.

7. The Court erred in holding that plaintiff is entitled to the relief sought.

8. The Court, in sustaining the tariff in question, erred in substituting its judgment for that of the Interstate Commerce Commission on administrative matters which have been placed by Congress within the jurisdiction of the Interstate Commerce Commission.

9. The Court erred in failing to sustain the order of the Interstate Commerce Commission.

10. The Court erred in failing to dismiss the suit for want of equity.

11. The Court erred in entering the interlocutory order of April 24, 1942, temporarily restraining the enforcement of the order of the Commission.

12. The Court erred in making and entering the final decree of August 17, 1942, permanently enjoining, annulling and setting aside the order of the Interstate Commerce Commission.

Dated October 14, 1942.

(s) DANIEL W. KNOWLTON,

*Chief Counsel.*

(s) DANIEL H. KUNKEL,

*Attorney for Interstate Commerce Commission.*

(s) JOHN E. McCULLOUGH,

*For J. M. Kurn and John G. Lonsdale,  
Trustees of the St. Louis-San Francisco Railway Company.*

(s) ERLE P. ZOLL, JR.,

*For Illinois Central Railroad Company.*

[File endorsement omitted.]



42

## In United States District Court

[Title omitted.]

*Notice of appeal*

Filed Oct. 15, 1942

*To the Attorney General for the State of Mississippi:*

You are hereby notified that the District Court of the United States for the Northern District of Mississippi, Eastern Division, on October 14, 1942, filed and entered an order allowing an appeal by the Interstate Commerce Commission, J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, and the Illinois Central Railway Company, to the Supreme Court of the United States from a decree filed and entered on the 17th day of August 1942, in the above-entitled cause, and that the citation signed by such court on October 14, 1942, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, defendant's jurisdictional statement pursuant to Rule 12 of the Revised Rules of the Supreme Court of the United States, and the statement required to be served on appellees by said Rule 12.

This notice is given to you pursuant to the provisions of U. S. Code, Title 28, Sec. 47a, Act of March 3, 1911, c. 231, Sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1918, c. 32, 38 Stat. 219, 220.

Dated October 14, 1942.

(s) DANIEL W. KNOWLTON,

*Chief Counsel.*

(s) DANIEL H. KUNKEL,

*Attorney.**For Interstate Commerce Commission.*

(s) JOHN E. MCCULLOUGH,

*For St. Louis-San Francisco Ry. Co.*

(s) EARLE J. ZOLL, Jr.,

*For Illinois Central Railroad Co.*

Received a copy of the foregoing notice this 14 day of October, A. D. 1942.

(s) W. D. CONN, Jr.,

*Asst. Atty. Gen. for Attorney General for the  
State of Mississippi.*

[File endorsement omitted.]



- 44 In District Court of The United States for the Northern District of Mississippi, Eastern Division

[Title omitted.]

*Order allowing appeal*

Filed October 14, 1942

In the above-entitled causes, the Interstate Commerce Commission, J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, and the Illinois Central Railroad Company, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court in this cause, entered August 17, 1942, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and decreed that the appeal be, and the same is hereby allowed as prayed for, and it is further

Ordered that petitioners, other than the United States of America and the Interstate Commerce Commission, give bond in the sum of \$250.00 as a cost bond.

Dated October 14, 1942.

(s) S. C. Mize,  
*United States District Judge.*

- 45 [Citation in usual form showing service on Jackson, Young & Friend omitted in printing.]

- 57 In District Court of the United States for the Northern District of Mississippi, Eastern Division

[Title omitted.]

*Motion for order directing clerk to transmit original exhibits in lieu of copies*

And now comes Interstate Commerce Commission, Illinois Central Railroad Company and John M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, defendants appellant, and moves the court for an order directing the Clerk of the court to transmit to the United States Supreme Court the record before the Interstate Commerce Commission in



Docket 28590 and I. & S. 4899, as introduced in evidence in the trial of this cause, in lieu of copies thereof.

DANIEL W. KNOWLTON,  
DANIEL H. KUNKEL,  
*For Interstate Commerce Commission.*

JOHN E. McCULLOUGH,  
*For J. M. Kern and John G. Lonsdale,*  
*Trustees of the St. Louis-San Francisco*  
*Railway Company, Debtor.*

ERLE J. ZOLL, Jr.,  
*For Illinois Central Railroad Company.*

58 November —, 1942, Columbus and Greenville Railway Company, plaintiff appellee, consents to the entry of the order sought in the above motion.

FOREST V. JACKSON,  
R. C. STOVALL,  
*For Columbus and Greenville Railway Company.*

*Order of court*

Upon consideration of the within motion and it appearing that the appellee consents to the entry of the order sought by said motion,

It is ordered, that the Clerk of court transmit to the United States Supreme Court the record before the Interstate Commerce Commission in Docket 28590 and I. & S. 4599, as introduced in the trial of this cause, in lieu of the copies thereof.

By the Court.

SIDNEY C. MIZE,  
*U. S. District Judge.*

Dated January 2, 1943.

62 In United States District Court

[File endorsement omitted.]

[Title omitted.]

*Stipulation for transcript of record*

Filed Dec. 4, 1942

Under authority of Rule 10 of the Revised Rules of the Supreme Court counsel for appellants and counsel for appellee hereby stipulate and agree that the transcript of the record in the above-entitled cause to be transmitted by the clerk of this court to and filed in



the Supreme Court of the United States, pursuant to an appeal allowed, shall include the following, to-wit:

1. Original complaint and exhibits annexed thereto.
2. Answer of Interstate Commerce Commission.
3. Joint answer of defendant railroad companies.
4. Answer of United States.
5. Motion of defendant railroad companies to amend answer.
6. Order organizing three-judge court.
7. Testimony and exhibits before the Interstate Commerce Commission in Docket 28590, Cottonseed Allowances of Columbus and Greenville Railway Company.
8. Testimony and exhibits before the Interstate Commerce Commission in Investigation and Suspension Docket 4599, Allowances on Cottonseed at Columbus and Greenville Railway Points.
- 8½. Transcript of stipulation and agreement with reference to the record before the Three-Judge Court.
9. Report of Interstate Commerce of May 3, 1940, in Investigation and Suspension Docket 4599.
10. Opinion of Court below and final decree.
11. Petition for Appeal.
12. Assignment of Errors.
13. Notice of Appeal and acknowledgement of service.
14. Order allowing appeal.
- 63 15. Citation in appeal.
16. Notice under Rule 12.
17. Motion and order for transmitting original records and exhibits before the Interstate Commerce Commission in Docket 28590 and Investigation and Suspension Docket 4599.
18. Motion and order enlarging time for docketing case in Supreme Court and filing record therein.
19. This stipulation.

(s) DANIEL W. KNOWLTON.

(s) DANIEL H. KUNKEL,

*For Interstate Commerce Commission.*

(s) JOHN E. McCULLOUGH,

*For J. M. Kurn and John G. Lonsdale,*

*Trustees of the St. Louis-San Francisco Railway Company,*

*Debtor.*

(s) EEL J. ZOLL, Jr.,

*For Illinois Central Railroad Co.*

(s) R. C. STOVALL,

(s) FOREST B. JACKSON,

*For Columbus and Greenville Railway Company,*

*Appellee.*

- 64 [Clerk's certificate to foregoing transcript omitted in printing.]



65

## In Supreme Court of the United States

[File endorsement omitted.]

[Title omitted.]

*Statement of points to be relied upon and stipulation as to  
record to be printed*

Filed Feb. 6, 1943

The appellants in the above entitled cause for their statement of points to be relied upon adopt their assignment of errors.

Appellees further state that the entire record in this cause, as filed in this Court, is necessary for consideration of the points relied upon, and the transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court excepting those parts specified in Stipulation Re Printing of Record filed in this Court.

DANIEL W. KNOWLTON,  
*Chief Counsel.*

DANIEL H. KUNKEL,  
*Attorney.*

*For Interstate Commerce Commission, for J. M. Kurn  
and John G. Lonsdale, Trustees of the St. Louis-San  
Francisco Railway Company, for Illinois Central  
Railroad Company, Appellants.*

66

Copies of the within statement were mailed to Mr. Forrest B. Jackson, Attorney, Lampton Building, Jackson, Mississippi, and Mr. R. C. Stovall, General Counsel, Columbus and Greenville Railway Company, Columbus, Mississippi, Counsel for Appellee herein, this 5th day of February 1943.

DANIEL H. KUNKEL,  
*Attorney.*

[File endorsement omitted.]

67

## In Supreme Court of the United States

*Stipulation for the printing of the record*

Filed Feb. 10, 1943

It is hereby stipulated by and between counsel for appellants and counsel for appellee, in lieu of their respective designations of the parts of the record considered by them necessary for the consideration of the points upon which they will rely, that the printed record before the United States Supreme Court in this cause shall consist of the following items:

1. The original complaint and exhibits annexed thereto.
2. Answer of the Interstate Commerce Commission.



3. Joint answer of defendant railroad companies.
4. The report of the Interstate Commerce Commission in I. & S. Docket 4599, dated May 3, 1940.
5. Opinion of the court below and final decree.
6. Petition for appeal.
7. Assignment of errors.
8. Order allowing appeal.
- 68 9. Citation in appeal.
10. Notice of appeal.
11. Praecept for transcript of record.
12. Notice under Rule 12.
13. Motion and order for transmitting original exhibits in lieu of copies.
14. Statement of points to be relied upon.
15. This stipulation.

It is further stipulated that the record before the Interstate Commerce Commission in Docket No. 28590 and I. & S. 4599, introduced in evidence in the court below, shall not be printed as part of the record in this cause, but shall be retained as part of said record and may be referred to by the court and by counsel for the parties in their briefs and argument in this cause.

**FORREST B. JACKSON,**

*For Columbus and Greenville Railway Company.*

**DANIEL W. KNOWLTON,**

**DANIEL H. KUNKEL,**

*For Interstate Commerce Commission.*

**JOHN E. McCULLOUGH,**

*For J. M. Kurn and John G. Lonsdale,*

*Trustees of the St. Louis-San*

*Francisco Railway Company, Debtor.*

**ERLE J. ZOLL, Jr.,**

*For Illinois Central Railroad Co.*

69

**SUPREME COURT OF THE UNITED STATES**

**No. 628, October Term, 1942**

*Order noting probable jurisdiction*

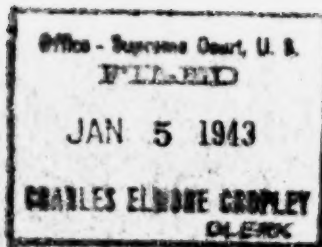
**February 1, 1943**

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] Enter Daniel W. Knowlton. File No. 47,129. D. C. U. S., N. Mississippi. Term No. 628. The Interstate Commerce Commission, J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, et al., Appellants, vs. Columbus and Greenville Railway Company. Filed January 5, 1943. Term No. 628 O. T. 1942.



FILE COPY



No. 628

**In the Supreme Court of the United States**

OCTOBER TERM, 1942

THE INTERSTATE COMMERCE COMMISSION, J. M.  
KURN AND JOHN G. LONSDALE, TRUSTEES, ST.  
LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,  
APPELLANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

STATEMENT AS TO JURISDICTION



No. 161

COLUMBUS AND GREENVILLE RAILWAY COMPANY,  
PLAINTIFF

v.

UNITED STATES OF AMERICA INTERSTATE COMMERCE  
COMMISSION, ST. LOUIS-SAN FRANCISCO RAILWAY  
COMPANY, AND ILLINOIS CENTRAL RAILROAD COM-  
PANY, DEFENDANTS

**JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER  
RULE 12 OF THE REVISED RULES OF THE SUPREME  
COURT OF THE UNITED STATES**

The Interstate Commerce Commission, J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company, and the Illinois Central Railroad Company, defendants, respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

**A. STATUTORY PROVISIONS**

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended



by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, section 35, 31 Stat. 85; April 30, 1900, c. 339, section 86, 31 Stat. 158; March 3, 1909, c. 269, section 1, 35 Stat. 838; March 3, 1911, c. 231, sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938).

**B. THE STATUTE OF A STATE OR THE STATUTES OR TREATY OF THE UNITED STATES, THE VALIDITY OF WHICH IS INVOLVED**

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.



**C. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVISED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED**

The decree sought to be reviewed was entered on August 17, 1942. The petition for appeal was presented and allowed on October 14, 1942, together with the assignment of errors.

**D NATURE OF CASE AND RULINGS BELOW**

This is an appeal from the decree of the District Court for the Northern District of Mississippi, Eastern Division, entered August 17, 1942, enjoining, annulling, and setting aside an order of the Interstate Commerce Commission dated January 3, 1942, in a proceeding known as Docket No. 28590, *Columbus & Greenville Ry. Co. Cottonseed Allowances*. The proceeding before the Commission involved the validity of a certain tariff of the Columbus & Greenville Railway (Columbus & Greenville Ry. Co.'s freight tariff 9-B, I. C. C. No. 81), which provided in substance, inter alia, that where cottonseed is transported by a railroad *other* than the Columbus & Greenville to a mill point and is there processed and its product substantially reshipped over the lines of the Columbus & Greenville and its connections to an interstate destination under tariffs providing a joint rate of the Columbus & Greenville and such connecting lines, the Columbus & Greenville will make a prescribed refund to the shipper from the



mill point, measured by the weight of the shipment and the length of the movement inbound to the mill point. This refund is referred to as a "cut-back" rate.

By its report and order of January 3, 1942, the Commission condemned the tariff as in violation of sections 1 (6), 6 (4) and 6 (7) of the Interstate Commerce Act and directed the Columbus & Greenville Railway to cancel said tariff. The effective date of this order was subsequently extended to April 28, 1942. The basis for the order of the Commission was, in substance, that the tariff operated as a reduction in the outbound joint rate without the concurrence of all the carriers parties to such rate. A tariff of the Columbus & Greenville Railway providing a similar "cut-back" rate had previously been condemned by the Commission in a proceeding known as *I. & S. 4599, Allowances on Cottonseed at Columbus & Greenville Railway Points*, 238 I. C. C. 309. The record and report of the Commission therein were made part of the record in the later proceeding, from which the instant case has developed.

On April 3, 1942, the Columbus & Greenville Railway, pursuant to the provisions of section 41 (28) and sections 43 to 48, inclusive, of Title 28, U. S. C., filed a complaint naming as defendants the United States, the Interstate Commerce Commission and the two railroads who were inter-



veners before the Commission, namely, St. Louis-San Francisco Railway Company and Illinois Central Railroad Company. This complaint prayed that the court issue an interlocutory and temporary restraining order suspending and restraining the operation, enforcement, and execution of the Commission's order of January 3, 1942, and upon final hearing for an order permanently enjoining, setting aside and annulling said order.

Answers to the complaint were filed by the respective defendants and the case was heard upon final hearing on April 24, 1942, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220). The record before the Commission was offered and received in evidence and the matter argued by the several parties. Thereafter, on the same day, the court entered an order temporarily restraining the enforcement of the Commission's order pending final decision on the merits.

The fundamental question involved was whether the Commission had erred in holding that the tariff in issue was in violation of sections 1 (6), 6 (4), and 6 (7) of the Interstate Commerce Act.

Thereafter, by opinion filed July 31, 1942, the lower court held that the tariff of plaintiff Columbus & Greenville Railway was a valid tariff and not in contravention of any of the provisions of the Interstate Commerce Act and that the order



of the Commission requiring plaintiff to cancel said tariff was without authority in law. The final decree granting plaintiff the relief sought was entered on August 17, 1942. It is this decree that is here sought to be reviewed.

The question presented by this appeal is a substantial one. It involves an interpretation and application of sections ~~5~~<sup>1</sup> (6), 6 (4), and 6 (7) of the Interstate Commerce Act in relation to the publication and establishment of joint rates. Aside from the local situation immediately affected, the decision of the lower court has established principles relating to the publication of joint rates which will have far-reaching effect. Since these principles are contrary to the well-recognized concept of joint rates, it is important that the Supreme Court pass finally upon them.

**E. CASES SUSTAINING THE SUPREME COURT'S JURISDICTION OF THE APPEAL**

*United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

*United States v. Baltimore & Ohio Railroad Company*, 293 U. S. 454;

*Florida v. United States*, 282 U. S. 194;

*Baumont, Sour Lake & Western Railway Company v. United States*, 282 U. S. 74;

*Ann Arbor Railroad Company v. United States*, 281 U. S. 658;

*Louisville & Nashville R. R. Co. v. United States*, 238 U. S. 1;



*Interstate Commerce Commission v. Union Pacific Ry. Co.*, 222 U. S. 541;

*United States v. Lowden*, 308 U. S. 225;

*Hudson & Manhattan R. Co. v. United States*, 313 U. S. 98; and

*Interstate Commerce Commission v. Railway Labor Executives Association*, 315 U. S. 373.

#### F. OPINION AND DECREE OF THE DISTRICT COURT

Appended to this statement is a copy of the opinion and a copy of the decree of said court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated October 14, 1942.

✓ (s) DANIEL W. KNOWLTON,  
Chief Counsel.

✓ (s) DANIEL H. KUNKEL,  
Attorney for Interstate Commerce Commission.

✓ (s) JOHN E. McCULLOUGH,  
For J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company.

(s) ERLE J. ZOLL, JR.,  
For Illinois Central Railroad Company.

Filed this 15 day of October, 1942.

HUBERT D. STEPHENS, JR.,  
Clerk.

By (s) RUTH WEST, D. C.



No. 161

**COLUMBUS & GREENVILLE RAILWAY COMPANY**

*v.*

**THE UNITED STATES OF AMERICA ET AL.**

**THREE JUDGE COURT**

Before **HOLMES**, Circuit Judge, and **DAWKINS** and  
**MIZE**, District Judges

**MIZE**, District Judge.

The validity of the order of the Interstate Commerce Commission requiring the plaintiff, C. & G. Railway Company, to cancel certain provisions of a cut-back rate tariff is posed for determination by this suit. The Commission found plaintiff's freight tariff 9-B I. C. C. No. 81 to be in violation of sections 1 (6), 6 (4), and 6 (7) of the Interstate Commerce Act. The basis for the Commission's action is contained in two reports, being I. & S. Docket No. 4599, 238 I. C. C. 309, and No. 28590 decided January 3, 1942. The last-mentioned report being the one that is particularly in controversy, the record and report of the former being made part of the record in the latter.

The facts in the case are not in dispute. The tariff provisions which the Commission has condemned, provide that when cottonseed is transported by a railroad other than the C. & G. Rail-



way Company to a mill point and is there processed and its products subsequently reshipped over the line of C. & G. Railway Co., the C. & G. Railway Co. will make a prescribed refund to the shipper, based upon the in-bound shipment and the length of movement from the origin to milling point. This provision is contained in plaintiff's tariff No. 81, being Item 5 thereof, and which provides that it shall be applicable on cottonseed in carloads from stations on the C. & G. Railway and on cottonseed from stations on connecting lines via such lines to mill points on the C. & G. Railway where in both cases subsequent shipment of the product is made from such mill points via the C. & G. Railway. Item 40 of the tariff provides for a scale of rates based upon the distance of the in-bound movement.

The effect of this tariff is that the schedule of rates prescribed is used as a measure for making refunds on the subsequent reshipments of the product out of the mill point and is not applied in the first instance upon the in-bound movements. On in-bound movement a local rate is charged and collected and subsequently upon shipment out of the mill point over the C. & G. Railway the C. & G. Railway Company refunds to the shipper the difference between the local rate in-bound and the rate prescribed in tariff No. 81, depending upon the length of the in-bound movement. This tariff is applied on all in-bound movements by rail, whether such transportation is performed by the C. & G. Railway Company or any other carrier serving the mill point. The line of the C. & G. Railway Co. lies wholly within the State



of Mississippi. Movement of cottonseed products from any of the mill points on its lines to points outside of the State of Mississippi involves movement over the line of the C. & G. Railway and the connecting carrier. The C. & G. Railway Co. has joint rates on cottonseed products in effect from origin on its line to destination reached by connecting carriers, and such joint rates are properly concurred in by all participating carriers.

The report of the Commission shows that the investigation was instituted upon its own motion concerning the lawfulness of the rates. The St. Louis-San Francisco Railway Co. and the I. C. Railroad Co., competitors of the C. & G. Railway Co., intervened in the hearing. Each of these interveners has a tariff substantially identical with the tariff of plaintiff, except that the tariff of each of these provides for a cut-back only upon cottonseed products processed from cottonseed originating in-bound on the lines of such carrier. The rates for the in-bound movements of cottonseed are published in tariffs local or joint governing the movement to the mill point. The rates on cottonseed products from the mill point are published in tariffs local or joint governing the movement from the mill point.

It is the contention of the plaintiff that the rate provided in the tariff is reasonable, just, not discriminatory, and that it is necessary in order to meet the competition of the trunk line carriers, and that the amount of freight paid by the shipper when moving out-bound products over plaintiff's line is identically the same as it would be if the products moved out over its com-



petitors' lines; that unless this tariff is permitted to stand, plaintiff, of course, is unable to meet the rate in effect by its competitors; that the processed products of the cottonseed became free freight at the mill points and the plaintiff is entitled to compete for free freight upon substantially equal terms with its competitors. That tariff No. 81 is not a joint tariff.

Interveners object to the tariff upon the theory that it attempts to name rates for account of their lines without their concurrence. That (1) their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point; (2) to permit plaintiff's tariff to remain would, in effect, permit it to charge a less rate than that shown by its joint tariff and without concurrence of those carriers concurring in the joint rate.

The testimony shows without dispute that this tariff is profitable to plaintiff; that by its provisions and enforcement none of the capital investment of plaintiff is impaired; that the connecting carriers receive the entire proceeds from the rates as published applicable to them; and that plaintiff absorbs the entire amount of this cut-back. The testimony shows, too, that it does not vary in any respect whatsoever from the published tariff.

The tariff sets up a procedure by which the shipper of the out-bound products are required to file through the claim channels of plaintiff the original bill of lading upon the in-bound cottonseed within fifteen months and that then, in accordance with this tariff, the refund is made. The Commission did not find that the tariff was un-



reasonable, unjust, or discriminatory, but determined that the form and manner in which the tariff is published does not conform to the requirements of Section 6 (4) and 6 (7) of the Act, and that it was unlawful by virtue of Section 1 (6) of the Act. The Commission was without power to declare the tariff unlawful unless it found from the evidence as a fact that the tariff was in violation of 6 (4) or 6 (7) or otherwise violated 1 (6).

The court is without power to review the Commission's conclusions of fact. *Interstate Commerce Commission v. Delaware, etc., Railway*, 220 U. S. 235. The legal effect of evidence, however, is a question of law, and when there is no dispute in the facts, the matter is then to be determined by the court as a matter of law. *Interstate Commerce Commission v. L. & N. Railway Co.*, 227 U. S. 88; *U. S. v. C. M., St. Paul & Pacific Ry. et al.*, 294 U. S. 499. The carrier retains the primary right to make rates but if after a hearing they are shown to be unreasonable, it is then the duty of the Commission to set them aside and require the substitution of just for unjust rates. *Interstate Commerce Commission v. L. & N., supra*.

The purposes of the Interstate Commerce Act are clearly stated in *Interstate Commerce Commission v. B. & O. Railway Co.*, 145 U. S. 265. Among others mentioned, one of the purposes was to prohibit unjust discrimination in the rendition of like service under similar circumstances and conditions, and to prevent undue or unreasonable preference to persons or localities, but that it was not designed to prevent competition between different roads, and that it was not all discrimina-



tions or preferences that fall within the inhibition of the statute, only such as are unjust or unreasonable.

The freight that was sought to be captured by plaintiff's tariff was free freight and plaintiff, by any lawful means, had the right to endeavor to receive it. *Atchison, T. & S. F. Ry. Co. v. U. S.*, 279 U. S. 768. Under this authority the competitors of plaintiff had no more right to recapture the freight because they brought the cotton seed in than does plaintiff have the equal right to compete for it upon equal terms. The shipper is entitled to a free choice of carriers upon substantially the same terms. In *T. & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, the court stated: "The traffic thus secured was remunerative to the Railway Company and was obviously beneficial to the consumers at the place of destination, who were those enabled to get their goods at lower rates than would prevail if this custom of through rates were destroyed. \* \* \*

The Commission did not charge, or find that the local rates charged by the defendant company were unreasonable. \* \* \*

The very terms of the statute that charges must be reasonable, that discrimination must not be unjust, or that preference or advantage to any particular person, firm, corporation, or locality must not be undue or unreasonable necessarily implied that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to



carry into effect and enforce the provisions of the act." Carriers have a right to initiate rates as long as they do not violate the terms of the Act. The Act itself leaves common carriers as they were at the common law. They make special rates looking to the increase of their business, as long as they publish and file their rates and otherwise conform to the Act of Congress. *Interstate Commerce Commission v. C. G. M. Ry. Co., et al*, 209 U. S. 108; *U. S. et al. v. I. C. Ry. Co., et al.*, 263 U. S. 515; *U. S., et al. v. C. M., St. Paul & Pacific Ry. Co., et al.*, 294 U. S. 499. The plaintiff, by publishing the condemned tariff, was not seeking any advantage. It was only seeking equality in order that the shipper might have a choice of routes to be determined by him upon a substantial equality. His good faith in this respect was not questioned. His motive was pure. Without this tariff his right to compete for this outbound freight is destroyed. "The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions and that such action does not amount to undue discrimination." *T. & P. v. U. S.*, 289 U. S. 627. The report of the Commission states: "The purpose of making the refund is to enable it to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating lines held themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move outbound products over their lines. If it were not for the cut-back rates on the connecting lines, there would be no necessity for respondent's tariff, as the inbound



shipments move from origin points to the mills at the local rates under separate bills of lading." The report states further that the refunds or cut-back are exactly the same in amount as those of the other carriers serving the mill points. The report further states that the legality of the interveners' tariffs is not in issue.

We think the legality of the interveners' tariffs, while not necessarily in issue, is very material to a correct solution of the validity of the plaintiff's tariffs. The legality of interveners' tariffs is not questioned by anyone and it is assumed that they are valid until declared invalid. They have been in existence since 1931 and were adopted by the competitors for the purpose of meeting truck competition, as is shown by the report of the Commission, Division 3, in Docket No. 4599, I. & S. D. No. 459.

A clear analysis of plaintiff's tariff demonstrates that it in no wise affects the amount of the rates paid for the inbound service to the mill point. It does not affect the outbound rate of connecting carriers. But the refund is absorbed entirely by the plaintiff. There is no other carrier a party to plaintiff's condemned tariff. The tariff, in substance, is essentially the same as that of the intervening trunk lines, and if it were not for those tariffs of the intervening trunk lines, then there would be no necessity for the plaintiff's tariff, and probably it never would have been promulgated.

Shippers pay the full amount of freight as published on the inbound movements over any of the roads. Likewise on the outbound movements the full amount of freight is paid and by the terms



of the tariff is in no way affected. The effect of the condemned tariff is that when the processed products are shipped over C. & G.'s road, it will absorb a part of the inbound freight charges as published by its tariff, upon compliance with the procedure therein contained. The Plaintiff is therefore entitled to the relief sought.

Appearances: Forrest B. Jackson, Jackson, Mississippi, R. C. Stovall, Columbus, Mississippi, Z. P. Hawkins, Columbus, Mississippi, Counsel for Columbus & Greenville Ry. Co.; Daniel H. Kunkel, Office of Chief Counsel, Interstate Commerce Commission, Washington, D. C., Counsel for Interstate Commerce Commission; Robert L. Pierce, Special Attorney, Department of Justice, Washington, D. C., Counsel for United States of America; John E. McCullough, 1025 Frisco Building, St. Louis, Missouri, Counsel for St. Louis-San Fran. Ry. Co.; Erle J. Zoll, Jr., 135 E. 11th Place, Chicago, Illinois, Counsel for Illinois Central R. R. Co.

GULFPORT, MISSISSIPPI.

*July 31, 1942.*



No. 628

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**In the Supreme Court of the United States**

OCTOBER TERM, 1942

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INTERSTATE COMMERCE COMMISSION, J. M. KURN  
AND JOHN G. LONSDALE, TRUSTEES OF THE  
ST. LOUIS SAN FRANCISCO RAILWAY COMPANY,  
AND ILLINOIS CENTRAL RAILWAY COMPANY,  
APPELLANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,  
APPELLEE

---

*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION*

---

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.  
APPELLANT

March 1943.

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI,  
EASTERN DIVISION*

---

**BRIEF FOR THE INTERSTATE COMMERCE COMMISSION**

---

## **OPINIONS BELOW**

The opinion of the specially constituted District Court (R. 66) is reported in 46 Fed. Supp. 204. The reports of the Interstate Commerce Commission involved (R. 5, 56) are reported in 238 I. C. C. 309 and 248 I. C. C. 441.



## JURISDICTION

The final decree of the District Court (R. 71) was entered August 17, 1942, and the appeal was allowed October 14, 1942 (R. 76). Probable jurisdiction was noted February 1, 1943. The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; 28 U. S. C. Supp. III, secs. 45 and 47a) and section 238 of the Judicial Code as amended by the Act of February 12, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., sec. 345).

## STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

## QUESTIONS PRESENTED

The appellee railroad, whose line extends from Columbus to Greenville, both in Mississippi, serves together with other railroads certain mill points where cottonseed, transported from country origins in Mississippi and other States, is processed into products which subsequently are transported to marketing destinations. Under the tariffs of all the railroads, including tariff of the appellee: While the individual railroad must collect its full local rate at the mill point on an inbound shipment of cottonseed from a station on its lines, provision is made for a refund where the outbound shipment of processed products is



also made over its lines, the proffered refund being in every case based on the weight of the inbound shipment and length of haul from origin to mill point. The tariff of the appellee, however, in addition to holding out such refund, provides for refunds (similarly computed) on cottonseed originated and brought to the mill points by other railroads where the outbound shipments of the products are made over its line, and thus would, if taken as it reads, purports to change the tariffs of inbound rates of the other railroads. On the other hand, since the appellee reaches the marketing destinations of the outbound products only through, and under joint rates with, connecting railroads, its tariff (not concurred in by its connections) would, if taken to in fact work reductions in the rates on the outbound shipments, be a tariff under which the appellee was assuming to change the published joint outbound rates by action of itself alone.

The ultimate question presented is whether the action of the Commission, in ordering the appellee to cancel its tariff insofar as it provides for refunds on traffic originated and hauled to the mill points by other railroads, was not within its authority and otherwise lawful. Subordinate questions presented are

1. Whether the Commission either erred or exceeded its authority in determining and finding that the said provision for refunds in appellee's



individual tariff did not conform to the requirements of section 6 (1) and (4), and section 1 (6) of the Act.

2. Whether, in the event the Commission was right and within its authority in reaching such determination, it was not also right and within its authority in determining that the said provision for refunds had no place in the published tariffs and, therefore, that it served only as a "cloak" for the making of unlawful refunds or rebates from the lawfully established rates and charges in violation of section 6 (7) of the Act, and

3. Whether this Court's decision in *Atchison, Topeka & S. F. Ry. v. United States*, 279 U. S. 768, supports the appellee's contentions that its tariffs practice is lawful.

### STATEMENT

This is a direct appeal from a final decree (R. 71) of the court below enjoining and setting aside, in a suit instituted by the appellee railroad, an order entered by the Commission in a proceeding entitled *Cottonseed Allowances of Columbus and Greenville Railway Co.*, 248 I. C. C. 441.

The proceeding was an outgrowth of an earlier proceeding, *Allowances on Cottonseed at Columbus and Greenville Railway Points*, 238 I. C. C. 309, in which the Commission, following suspension of the appellee's proposed tariff I. C. C. 83, and after hearing, entered an order requiring its can-



cellation. The tariff had been filed to take the place of the appellee's tariff I. C. C. 81 which made provision for a refund, or "cut-back", in connection with the rates to and from mill points on its line on cottonseed and its processed products, such refund being provided for not only in instances where the cottonseed was originated and hauled to the mill points by the appellee but also in instances where it was originated and moved to the mill points by other railroads. Because of this, the later tariff, although it had escaped suspension and become effective, was subsequently criticised by the Commission's Bureau of Tariffs (R. 57). The proposed tariff I. C. C. 83 would have changed the provisions criticised to some extent but the Commission, in finding the provisions as proposed unlawful, also found that they were in substance the same as those contained in the appellee's established tariff 81 (R. 65), and, since its rejection of the tariff proposed in place thereof would leave the established tariff unchanged, it included in the order entered in the suspension proceeding a provision citing the appellee to show cause why its tariff 81 should not be amended to eliminate the provisions in question (R. 65). Subsequently the Commission on its own motion instituted the investigation into the lawfulness of the rates, charges, rules, regulations, and practices, published in appellee's tariff I. C. C. 81—the proceeding here directly involved.



At the hearings held before an examiner the railroads which had been protestants in the suspension proceeding intervened and, by stipulation of the parties, the record and the Commission's report in the suspension proceeding were made a part of the record in the later proceeding (R. 6). Additional testimony and evidence were introduced and, following the hearings, a proposed report of the examiner was served on the parties. The respondent filed exceptions to the report, replies thereto were made by the interveners and the issues were orally argued before the entire Commission. On January 3, 1942, the Commission issued its report in which it found that to the extent the appellee's "Tariff I. C. C. No 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act" (R. 11). The order of the Commission, entered the same day, required the appellee "to cancel such unlawful provisions of said tariff \* \* \*" (R. 12).

Section 1 (6) makes it the duty of all common carriers, subject to the provisions of Part I, to establish, observe, and enforce just and reasonable regulations and practices affecting classifications, rates or tariffs, and prohibits and declares unlawful every unjust and unreasonable classification, regulation, and practice.



Section 6 (1) requires every railroad to file with the Commission and publish schedules showing all the rates, fares, and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other railroad when a through route and joint rate have been established; and where no joint rate over the through route has been established, requires the several carriers in such routes to file and publish the separately established rates applicable to the through transportation.

Section 6 (4) requires that the several carriers which are parties to any joint tariff shall be specified therein and that each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission.

Section 6 (7) provides that no carrier shall engage or participate in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of Part I; and that no carrier shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs and the



rates, fares, and charges which are specified in the tariff filed and in effect at the time; and that no carrier shall refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs.

In its two reports the Commission covers the facts comprehensively. The appellee, whose line of railroad extends east and west between Columbus and Greenville, Mississippi, serves, together with other railroads, certain mill points where cottonseed transported from country origins in Mississippi and other States is processed into various products which are subsequently shipped outbound to marketing destinations. At Columbus, it connects with lines of the Southern Railway, the Frisco and the Mobile and Ohio. At West Point it connects with the Mobile and Ohio and the Illinois Central, and at Greenville, Greenwood and Moorhead with a subsidiary of the Illinois Central. The junctions mentioned are all mill points and, in addition, there is a mill at Indianola which point is local to the appellee railroad (R. 57).

Under appellee's tariff I. C. C. 81, the "rates and rules" therein published apply:

(Item 5 (a)) on cottonseed, in carloads, from stations on its line, or received from



connecting lines, and moved to the mill points above named for processing, and the subsequent shipment of the processed products from such points via the appellee's railway; also

(Item 5 (b)) on cottonseed, in carloads, from stations on connecting lines, via such lines to the mill points named (except Indianola) when the processed product is subsequently shipped from such points via the appellee's railway (R. 6, 7).

Subsequent items of the tariff (Ex. C, R. 13) provide, inter alia, that shipments are not to be waybilled at the rates in the tariff but at the full local, or joint, rates lawfully applicable from origin to mill point; that, however, upon evidence of shipment of the processed product via the appellee's railway at the full published rates from the mill point, the freight charges on cottonseed to the mill point will be reduced to the basis of rates shown in item 40, such reduction to be made through freight claim channels (item 15), that is, by refund of part of the inbound charges (item 35). Item 40 provides for a scale of rates based upon the distance of the inbound movement of the cottonseed. The basis for computing the refund is such that when the appellee secures the outbound shipment of products processed from seed brought inbound to the mill point by another railroad the aggregate net amount payable by the shipper for the inbound and outbound movements



is the same as if his traffic were handled both in and out of the mill point by the other railroad. In addition to the condition that the outbound shipment must be made over the appellee's line to entitle a shipper to the refund, the tariff specifies that such shipment must be made within one year from the date of the inbound freight bill and that the claim for refund must be filed within 15 months from the date of the outbound shipment, supported by the original paid freight bill covering the inbound movement, a copy of the outbound bill of lading and a certificate that the claim is bona fide.

As pointed out in the first report (R. 60) there is nothing unusual in the appellee's cut-back tariff as such. Since 1931, for the purpose of meeting truck competition, all the railroads operating in Mississippi have published and maintained so-called cut-back tariffs applying on cottonseed and its products. Under the tariffs of the railroads other than the appellee, however, the cut-back, or refund, is made by a railroad only when both the inbound shipment of the seed and the outbound shipment of the products are over its line. None of them holds out the refund to obtain the outbound shipments of products processed from seed brought to the mill points by any other railroad, or except from seed moved in-bound to the mill points by itself (R. 59). The earlier cut-back tariffs of the appellee were the same in this re-



spect as the other railroads (R. 60). But by its tariff I. C. C. 81, which became effective October 16, 1938, it extended, as above shown, the provision, offering to refund a part of the in-bound charges on the seed when the out-bound shipment of the product is made over its line, to apply even though the in-bound shipment of the seed to the mill point was carried by another railroad (R. 60).

In justification of this before the Commission, the appellee urged in substance that such refunds were necessary to enable it to compete effectively for the outbound traffic; that, under this Court's decision in *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, the outbound movement of the processed products was "free traffic" for which it was entitled to compete whether or not the inbound shipment of seed was originated and transported by another railroad; that its tariff published no rates on such inbound shipments, as that term is generally accepted, but instead provided for an allowance, or refund, which, being published, was lawful; that the tariff was primarily a tariff publishing transit privileges which supplied the machinery for equalizing the rates on the inbound movements to the mill points and outbound movements to destinations over routes of the appellee and its connecting lines with the rates over the routes or lines of the competing railroads (R. 7, 8).



Answering these contentions in its first report, the Commission pointed to the effect of the tariff provision on the joint outbound rates on the processed products to which the appellee was a party, stating that such effect was to work a reduction in those rates without the concurrence of the other participating carriers; that the appellee could not, acting alone, lawfully reduce those rates (R. 62, 63); that the provision for allowances constituted a "device" by means of which the appellee would unlawfully refund a portion of the published joint rates in violation of section 6 (7) of the Act; and that the granting of an *alleged* allowance to the shipper notwithstanding that he performs no part of the transportation service constituted an unreasonable practice in violation of section 1 (6) of the Act (R. 64, 65). The Commission in its first report also deals with the contention that the provision in the appellee's tariff constitutes simply a local transit privilege within the holding of this Court in *Cent. R. R. of N. J. v. United States*, 257 U. S. 247, that

"Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of and without consulting, connecting carriers."

Referring to this holding the Commission said that (R. 63):



"Based on the foregoing decision, the Columbus & Greenville would have the right to provide for a transit arrangement on its line. It could provide for the stopping of the commodity at the transit point and the subsequent shipment at the lawfully established joint through rate from original point of shipment to final destination, without the concurrences of its connections, but it could not establish the joint rate itself without such concurrences."

Indicating another tariff means of equalizing rates on "transited traffic" the Commission further said that (R. 63):

"In several instances the Commission has approved varying proportional rates applicable over a line serving a transit point, but not reaching the origin territory, where the purpose was to equal the balances of the through rates applicable under transit arrangements of carriers originating the traffic and with lines both into and out of the transit point. *Export Rates on Grain and Grain Products*, 31 I. C. C. 616; *Southern Kansas Grain Assn. v. Chicago, R. I. & P. Ry. Co.*, 139 I. C. C. 641. \* \* \*

In its final report, the Commission referred particularly and at some length to the same contention that the appellee's tariff was primarily one publishing transit privileges and simply a means to equalize the net charge to the shipper from origin on another road to final destination



(R. 7, 8), and thereafter it gave consideration to the testimony of a witness of the appellee describing the working of the provision offering refunds on the inbound shipments of the other roads (R. 8, 9). Following this, the Commission, after first emphasizing that the appellee was not a party to the inbound rates of the other railroads and that no other railroad was a party to its tariff providing for refunds, stated, in effect, that, while the refunds, or allowances, so held out by the appellee were in the same amount as those of the other railroads, the essential difference between its practice and that of the other roads was that it held out and made an allowance on seed that it did not originate and carry inbound to the mill points, and absorbed the allowance so made out of its proportion of the outbound joint rates to which it was a party (R. 9). Continuing, the Commission stated in substance that the purpose of the appellee in making the allowance was to enable it to compete for the outbound products thereof by meeting the allowances held out by such roads when originating the inbound shipment; that it was true, as urged by the appellee, that its tariff, offering such allowance, would not be necessary except for the tariffs of the other roads; that, as for the contention of the appellee that, under *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, it had the right to offer the same concession as those roads on the ground that the inbound carrier



of the seed had no vested right to the outbound haul of the products milled therefrom, it considered that, while the legality of the tariffs of the other roads was not in issue, the distinction pointed to by them was important, namely, that (R. 10):

“the tariff of respondent attempts to name rates for account of their lines without their concurrence, whereas their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point.”

Following this, the Commission pointed to the particular provisions of the statute with which the tariff conflicted, saying (R. 10):

“Section 6 of the Interstate Commerce Act provides that every common carrier shall publish tariffs showing the charges for transportation between different points on its own line and between points on its own line and points on the line of any other carrier. Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4) of the act. The refunding of a portion of the rate published and applied by another carrier



in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the act.

\* \* \* Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute."

As will have been observed, the working of appellee's tariff is that, under it, the appellee offers to refund a part of the rates of a connecting road on shipments of cottonseed brought by the road to a mill point and, if securing in this way the out-bound shipments of processed products for movement to destination via its line, absorbs the refund so made out of its proportion, or division, of the out-bound rates to which it is a party either with the same road or some other connecting road. The refund paid by the appellee is in an amount which equalizes with the rates from country origin on the connecting road to ultimate destination, say, on the same road, the net transportation cost to the shipper, if routing his shipments so as to include the line of the appellee and the practical effect might be said to establish the appellee as party to joint rates with the connecting road from country origin to destination. On the other hand, if it be considered that the in fact effect of the provision is on the joint out-bound rates to which the appellee is a party, the result would be to



work a reduction in those rates down to the basis of proportional rates. The Commission's findings were not made in criticism of the end which the tariff was intended to accomplish, but were to the effect that the form and manner of the provision by which it was undertaken to accomplish the desired end did not conform to the requirements of the Act referred to, with the result that the practice under it, in all of its working ran counter to the basic provisions of the Act governing the publication and observance of tariffs of rates and charges.

In concluding its report, the Commission made plain that there was no objection to the tariff insofar as it provided for the refund on cottonseed originated and carried to the mill points by the appellee itself (R. 11), and, in this connection, it also referred to the proportion of the traffic which was shown of record to be subject to this operation of the appellee's tariff in comparison with the traffic originated by the other railroads and the traffic brought to the mill points by truck, saying:

" \* \* \* Respondent originates some 15 or 20 percent of the cottonseed milled at the junction points. Some 50 percent of the in-bound seed is brought into the mill points by truck. This leaves some 30 to 35 percent of the total traffic possibly subject to respondent's cut-back on traffic originating on other lines. No provision is made for refund to shippers on that portion of



the traffic brought into the mill points by truck. \* \* \*."

The Commission's ultimate findings read:

"We find that to the extent respondent's tariff I. C. C. No. 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act.

An appropriate order will be entered."

#### **PROCEEDINGS IN THE LOWER COURT**

On April 3, 1942, the appellee filed its complaint, asking that the Commission's order be enjoined and set aside, naming as defendants the United States, the Commission, and the railroad appellants herein. The defendants so named filed answers denying all material allegations (R. 53-56). On April 24, 1942, the hearing before the specially constituted three-judge court was held, at which hearing a certified copy of the record made before the Commission was introduced in evidence, and the case was orally argued and submitted for decision. On July 31, 1942, the court rendered its opinion holding the Commission's order invalid, and on August 17, 1942, it entered its final decree enjoining and setting aside the order.



## **SPECIFICATIONS OF ERROR TO BE URGED**

The lower court erred

1. In setting aside the Commission's order requiring the appellee to cancel its tariff I. C. C. 81 to the extent that it provides for refund to the shipper on traffic originated and hauled to the mill points by other rail carriers.

2. In finding that appellee's tariff does not affect the out-bound (in-bound, R. 70) rate of connecting carriers.

3. In finding that the out-bound freight rate is in no way affected by the terms of the appellee's tariff.

4. In holding that the appellant railroads' tariffs are very material to a correct solution of the validity of the appellee's tariff.

5. In finding that the appellee's tariff is essentially the same as those of the appellant railroads.

6. In finding that, without its tariff I. C. C. 81, the appellee's right to compete for the outbound freight is destroyed.

7. In substituting its judgment for that of the Commission on administrative matters committed to the Commission by Congress.

## **SUMMARY OF ARGUMENT**

1. The Commission's order requiring cancellation of that part of the appellee's tariff, which provided for reductions, by way of the refund, in the rates on cottonseed hauled inbound to the



mill points by other railroads when the outbound movements of the processed products are made via its line, was within its authority and fully supported by its findings of violations of the provisions of the Act governing the publication, maintenance and observance of tariffs of rates and charges.

The Commission found that the appellee was in no way a party to the inbound rates on seed from origins on the lines of its connecting roads and that no other railroad was a party, by concurrence or otherwise, to its tariff offering the refunds, and that, while the refund was in an amount exactly the same as the refunds made by the other roads, the difference between its practice and theirs was that it made a refund or allowance on seed which it did not originate and haul inbound to the mill points and absorbed the allowances so made out of its proportion, or division, of the joint outbound rates to which it was a party. This practice the Commission found to be unlawful as a whole. Its findings, however, were not made in necessary criticism of the end sought to be achieved by the appellee, namely, the equalizing of the rates on the traffic from origins on the other roads to ultimate destination when the appellee's line was included in the haul with the rates applicable when its line was not so included, but were to the effect that the form and manner of the provision by which it was undertaken to ac-



comply with the desired end did not conform to requirements of the Act to which it referred, with the result that the provision, and the practice effectuated by and under it ran counter in all of its working to the basic provisions of the Act governing the publication, maintenance and observance of tariffs of rates and charges.

2. The Commission in its first report developed fully the unlawfulness of the appellee's tariff practice in its effect on the joint outbound rates to which the appellee was a party. It there found that the effect would be to "reduce the lawfully published outbound rates without the concurrence of other carriers participating in the outbound haul"; that, in view of the requirement of section 6 (4) for concurrence of participating carriers, the appellee, acting alone, could not lawfully reduce such joint rates; that the refunds held out by the appellee constituted a "device" by means of which the appellee refunded a portion of the outbound rates in violation of section 6 (7); and that the granting of an alleged "allowance" to the shipper, notwithstanding that he performs no transportation constituted an unreasonable and unlawful practice in violation of section 1 (6).

In its final report the Commission condemned as unlawful the appellee's practice as a whole including the express provisions of its tariff under which the practice was effectuated and whereby it provided for a "cut-back" reduction in the in-



bound rates of other roads in the event the outbound movements of the products of the seed were made via its line. Contrary to the apparent view of the lower court, the Commission's authority over the tariffs filed with it includes authority to order cancelled a tariff provision which provides for an unlawful change in rates without necessity for determining that what is expressly and specifically provided for in the published tariff would in fact be effected. Further contrary to the apparent view of the lower court the Commission was not required to determine whether the tariff provision would either render the appellee's division of the joint outbound rates non-compensatory in violation of section 15 (6) of the Act or would work unjust discrimination in violation of sections 2 and 3. The Commission was determining, as it is authorized to do, the question whether the provision was a valid tariff provision conforming to the Act's requirements in respect thereof. Each and every of the Act's provisions governing the publication and observance of the tariffs is necessarily available to the Commission if it is to properly function in its every-day work of passing upon tariff provisions.

3. Following its determination that the tariff provision was unlawful in violation of section 1 (6) and section 6 (1) and (4) of the Act, the Commission in effect found that it resulted from this that the provision had no place in the pub-



lished tariff and that it was, accordingly, left as a provision in the appellee's individual tariff whereby it held out and paid an unlawful refund, or plain rebate, to induce the movement of traffic via its line in violation of section 6 (7) of the Act. The first mentioned violations found by the Commission supplied ample support for its order requiring cancellation of the provision, and the further violation is one of particular importance under the Act.

4. This Court's decisions in *Atchison, T. & S. F. Ry. v. United States*, 279 U. S. 768, and in *United States v. Chicago, M. St. P. & Pac. Ry.*, 294 U. S. 499, advanced by the appellee in justification of its tariff practice do not support its contention that its practice is lawful.

### ARGUMENT

#### **I. The Provision in the Appellee's Individual Tariff for Reductions, by Way of the Refund, in the Rates of Other Railroads Conflicts With the Fundamental Provisions of the Act Governing the Publication, Maintenance, and Observance of Tariffs of Rates and Charges**

1. The Tariff, in its Express Provisions, Reducing by Way of the Refund, the Inbound Rates on Cottonseed of Other Railroads, When the Outbound Movements of the Processed Products are Made via Its Line, Conflicts With the Provisions of Section 6 (1) and (4) and Section 1 (6) of the Act

As shown in the preliminary statement the appellee's tariff I. C. C. 81 provides expressly and in detail for reductions, by way of the refund, in



the inbound rates on cottonseed not only when the movement to the mill point is over its own line but also when it is over the line of another railroad, the refund in both cases being conditioned upon the outbound shipment of the processed products being made *via* the appellee's line. The appellee is shown by the record to originate a considerable proportion of the seed milled at the junction points (R. 11), and, presumably, is able to secure for movement *via* its line substantially the same proportion of the outbound shipments of the processed products, since none of the "cut-back" tariffs of the other railroads apply except in respect of outbound shipments of products processed from seed brought inbound to the mill points by the road publishing the tariff. In endeavoring to increase its proportion of the outbound traffic by the same tariff means of a "cut-back" reduction in rates, but in the rates of other roads, the appellee is unquestionably in conflict with the provisions of the Act governing the publication and observance of tariff rates and charges.

The appellee, while having a number of mill points scattered over its line, reaches the marketing centers of the products of the cottonseed only through, and under joint rates with, its connecting roads. Its "cut-back" tariff does not purport to reduce these rates; insofar, however, as it does in fact work such a reduction, it is unlawful because lacking the concurrence of the other roads,



parties with it to the joint outbound rates, and because of conflict with other provisions of the Act. The Commission in its two reports condemned the tariff as unlawful both in its express application to the inbound rates and in its effect, or working, on the joint outbound rates. The lower court also considered the tariff from both standpoints, holding, among other things, that (R. 70):

A clear analysis of plaintiff's tariff demonstrates that it in nowise affects the amount of the rates paid for the inbound service to the mill point. It does not affect the outbound rate of connecting carriers. But the refund is absorbed entirely by the plaintiff \* \* \*.

In addition to the obvious error of the court in concluding that neither the inbound nor the outbound rates were affected because the refund was absorbed by the appellee, it should be noted that the court's holding assumes that so long as a tariff's irregularities do not affect the rates, its failure to conform to the requirements of section 6 and section 1 (6) would not warrant its condemnation.

Giving consideration first to the tariff in its express language, proffering a refund on shipments of seed brought inbound to the mill points by other roads: The appellee, when securing in this way an outbound shipment of products processed from such seed, presumably absorbs the re-



fund out of its division of the outbound joint rate to which it is a party. By its tariff, however, the appellee provides, the same as when the shipment of seed moves inbound over its road, for a reduction, by way of the refund, in the inbound rate, and requires that the original paid inbound freight bill be submitted by the shipper. The refund is computed by application of the distance scales in the appellee's tariff to the distance from the origin of the inbound shipment on the other railroad to the mill point and is exactly in the same amount as held out by the tariff of the other railroad.

The Commission's report (R. 8-9) sets out testimony of a witness of the appellee with respect to the working of the tariff in respect of an inbound shipment over the Y. & M. V. Railroad (a subsidiary of the Illinois Central) from Coahoma, Miss., to Greenville, a distance of 87 miles. As shown by the witness, the rate of the Y. & M. V. from Coahoma to the mill point of Greenville is 8.4 cents per 100 pounds and it is collected by that road when the seed moves to Greenville. On the outbound shipment of products to Cincinnati, which the witness assumes to be made *via* the line of the appellee, the full joint rate of 48 cents by way of the appellee and its connections is collected by the appellee, which subsequently refunds "the shipper to basis of rate set forth in its tariff for 87 miles, or 7 cents," making the net cost "7 cents



to Greenville, plus 48 cents beyond, or a total of 55 cents." Further testimony of the witness shows that the procedure followed and the result attained are the same where both the inbound and outbound shipments are assumed to be routed over the Y. & M. V. (R. 9).

Following the illustration of the working of the tariff given in the report, the Commission first emphasized that the appellee was in no way a party to the inbound rates on cottonseed of its connecting roads and no other railroad was a party to its tariff providing for the refunds, and it then stated, in effect, that while the refunds or allowances so held out by the appellee were exactly the same in amount as those of the other railroads, the difference between its practice and the practice of the other railroads was that it held out and made an allowance on seed that it did not originate and carry inbound to the mill points and absorbed "the allowances so made out of its proportion of the joint outbound rates to which it was a party." The appellee's purpose in making the refund, the Commission stated, was to enable it to compete for the outbound products of seed carried inbound by the other roads, which latter held out such a refund when originating the inbound shipments. Since such inbound shipments of the other roads, the Commission further in effect said, moved to the mill points at the local rates, under separate bills of lading, the appellee



would have been under no necessity to offer a rate refund on them except that the originating and transporting roads did so. (R. 9-10.) Answering the appellee's contention that, under *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, it had the right to offer the same concession as those roads, on the ground that the inbound carrier of the seed had no vested right to the outbound haul of the products milled therefrom, the Commission said that, while the legality of the tariffs of the other roads was not in issue, the distinction pointed to by them was important, namely, that the appellee's tariff attempted to name rates for account of their lines without their concurrence, whereas their tariffs applied solely on inbound shipments of seed which they themselves transported. The Commission then referred to the provisions of the Act with which the appellee's tariff practice was in conflict, saying (R. 10-11):

"Section 6 of the Interstate Commerce Act provides that every common carrier shall publish tariffs showing the charges for transportation between different points on its own line and between points on its own line and points on the line of any other carrier. Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is pub-



lished clearly does not conform to the requirements of section 6 (1) and (4) of the Act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act."

"Respondent provides the same cut-back for cottonseed originating on its line which it brings into the mill points as do the other carriers serving those points. No objection is made to that practice. \* \* \*."

Section 6 (4) of the Act, referred to in the above, requires, as shown in the preliminary statement, concurrences of all participating carriers in joint tariffs, and section 1 (6) makes it the duty of the carriers to establish and observe just and reasonable regulations and practices affecting classifications, rates, or tariffs, and prohibits and declares unlawful every unjust and unreasonable classification, regulation, and practice.

As above shown, the Commission had succinctly described the appellee's tariff practice by its finding that its said practice was to make a refund, or allowance, on seed which it did not originate and carry inbound to the mill points, and to absorb the allowances so made out of its proportion of the outbound joint rates to which it was a party. This practice the Commission condemns as a whole. As pointed out in the preliminary statement, however, the Commission's findings are not



made in criticism of the end sought to be accomplished by the tariff but are to the effect that the form and manner of tariff provision by which it is undertaken to accomplish such end do not conform to the requirements of the Act mentioned, with the result that the provision itself and the practice under it, in all its working, necessarily conflicts with the same requirements.

It is plain that the provision for reductions, by way of the refund, in the inbound rates on seed of the other roads is not a provision which conforms to "the requirements of section 6 (1) and (4) of the Act" and also that it is a provision for "the refunding of a portion of the rates published and applied by" other carriers which unquestionably constituted an unreasonable and unlawful practice in violation of section 1 (6) of the Act. As found by the Commission, the appellee was not a party to the inbound rates of the other roads which its cut-back tariff purported to reduce and none of the railroads publishing those rates, nor any other railroad, was a party by concurrence, or otherwise, to its cut-back tariff (R. 9, 10). Contrary to the apparent view of the lower court (R. 68), these were findings of fact and predicated on them, it was manifest that the provision of the tariff for a "cut-back" reduction in the inbound rates of the other roads did not conform to, but was in conflict with, and violative of, the provisions of the Act referred to.



**2. The Appellee's Tariff and Its Practice Effectuated by and Under the Tariff Are Also Unlawful in Their Effect and Working on the Joint Outbound Rates**

As has been already emphasized, the Commission, following analysis thereof, stated that the appellee's tariff practice (in contrast with that of the other roads) was to make a refund, or allowance, on seed that it did not originate and carry inbound to the mill points, and to absorb the allowances so made out of its division of the joint outbound rates to which it was a party (R. 9).

In respect of the appellee's practice in its application to the inbound rates of other roads the lower court said (R. 70):

"A clear analysis of plaintiff's tariff demonstrates that it in no wise affects the amount of the rates paid for the inbound service to the mill point."

Even assuming this statement to be correct, it is a narrow and new view of the Commission's authority over the tariffs to consider that it is without power to order cancelled a tariff provision which provides for an unlawful change in rates except as it determines that what is expressly and specifically provided for in the published tariff would in fact be effected. There is no place in the tariffs for any such provisions. In any event, it is obvious that the Commission's condemnation of the tariff provision and the ap-



pellee's practice effectuated by and under it includes any of its unlawful working whether in respect of the inbound or the outbound rates.

The Commission in its first report developed fully the unlawfulness of the appellee's tariff practice in its effect on the outbound rates. It there said that the effect of the practice would be "to reduce the lawfully published outbound rate without the concurrence of other carriers participating in the outbound haul"; that, in view of section 6 (4) of the Act, the appellee, acting alone, could not lawfully reduce such joint rates (R. 62); that the refunds held out by the appellee constituted a "device" by means of which the appellee would refund a portion of the joint outbound rates in violation of section 6 (7) of the Act (R. 65); and that the granting of an alleged allowance to the shipper, notwithstanding that he performs no transportation service constituted an unreasonable practice in violation of section 1 (6) of the Act.

The lower court appears rather to have been under a misapprehension as to the nature of the issues involved, this being shown by its statement, among others, that (R. 68):

"The testimony shows without dispute that this tariff is profitable to plaintiff; that by its provisions and enforcement none of the capital investment of plaintiff is impaired; \* \* \*. The Commission did not find that the tariff was unreasonable, unjust or discriminatory, but determined



that the form and manner in which the tariff is published does not conform to the requirements of Section 6 (4) and 6 (7) of the Act, and that it was unlawful by virtue of Section 1 (6) of the Act. The Commission was without power to declare the tariff unlawful unless it found from the evidence as a fact that the tariff was in violation of 6 (4) or 6 (7) or otherwise violated 1 (6)."

Undoubtedly the Commission condemned the form and manner of the tariff provision by which the appellee sought to accomplish its ends, but the form and manner<sup>1</sup> of establishing tariff rates and charges, or changes therein, is governed by the statute and has long been regarded as committed to the Commission's supervisory and administrative authority as one of its most important functions. The appellee is but one of the railroads serving the mill points, doing so in part individually and in part under joint rates with other roads. It is not apparent that its traffic has suffered from the severe truck competition more than that of the other roads (R. 11, 60, 61) and, in any event, it seems plain that it cannot seek to stimulate the traffic moving via its line by providing in its strictly individual tariff for a refunding of a part of the inbound rates of other roads, whether the result is to in fact reduce those rates or to work a reduction in the established

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<sup>1</sup> Cf. *Export Rates on Grain*, 31 I. C. C. 616, 619, and *Grain Assn. v. C., R. I. and P. Ry.*, 139 I. C. C. 641, 655, the first referred to in first report (R 64)



joint outbound rates to which it is but one of the parties. This form and manner of improving its competitive situation, adopted by the appellee, is more simple and, if it were lawful, would doubtless be more certain than the steps lawfully open to it to achieve its own particular ends, but it is difficult to see just how it could be considered as conforming to the tariff requirements of the Act or any sound tariff requirements.

The Commission was not determining whether the tariff provision would either render the appellee's division of the outbound rates noncompensatory in violation of section 15 (6), or whether it would work unjust discrimination in violation of sections 2 or 3, but was determining whether it was a valid tariff provision conforming to the Act's requirements in respect thereof. And, as pointed out above, the Commission's conclusion that it was not such a valid provision was predicated upon findings which were of fact and which showed it to be a conclusion amply warranted by fact and reason.

3. **The Commission, Having Determined That the Provision in the Appellee's Individual Tariff for Rate Refunds was Unlawful, it Followed That the Provision Had no Place in the Published Tariffs and, Therefore, Served Only as a "Cloak" for the Making of Unlawful Refunds From the Published Rates and Charges in Violation of Section 6 (7) of the Act**

It should first be emphasized that the provision in the appellee's tariff in question, having been condemned as in conflict with the requirements of



section 6 (1) and (4) and section 1 (6) of the Act, these violations, of themselves, supplied ample support for the Commission's order requiring cancellation of the provision. The fact, however, that the provision was unlawful and, therefore, could not be considered as constituting a valid change in any of the rates involved, left it without any valid operation and, accordingly, as a provision in the appellee's individual tariff whereby it held out and paid an unlawful refund, or plain rebate, to induce the movement of traffic via its line in violation of section 6 (7) of the Act.

In this connection the Commission's first report reads (R. 64):

"\* \* \* Section 6 (7) provides, among other things, that no carrier shall 'charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates \* \* \* which are specified in the tariff filed and in effect at the time', and, further, that no carrier shall 'refund or remit in any manner or by any device any portion of the rates \* \* \* so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.' The word 'tariffs' as used in section 6 (7) must be interpreted as meaning joint tariffs, when considering joint rates.\* \* \*



In our opinion the allowances proposed by respondent would constitute a 'device' by means of which it would refund a portion of the rates specified in joint tariffs now lawfully on file with the Commission. The fact that the refund would be made out of respondent's division of the joint rate would be immaterial. Such a refund would be, essentially, a rebate,\* \* \*."

The fact that a rebate is no less unlawful because paid under cloak of tariff publication is, of course, well settled. The question, as arising under section 6 (7) of the Interstate Commerce Act, has generally involved alleged allowances published and paid to shippers under section 15 (13) of the Act on the assumption that the shipper was performing for the carrier some part of the transportation service included in the rates he paid. *United States v. American Tin Plate Co. et al. (Terminal Allowance Cases)*, 301 U. S. 402, involved orders of the Commission requiring the Pennsylvania and other railroads to desist from paying allowances (pursuant to published tariffs) to certain large industrial plants for the "spotting" of cars at points of unloading within the plants. The railroads delivered the cars to the plants by placing them on so-called interchange, or "hold", tracks, from which they were subsequently taken by the plant locomotives at times and to places suiting the needs and work of the plants. The Commission in its reports deal-



ing with the plants in question held, in effect, that the "spotting" done was the plants' own work and not that of the railroads covered by the rates and that, accordingly, the allowances paid therefor constituted unlawful refunds in violation of section 6 (7) of the Act. This Court, referring to the contentions of the plants, said (406) :

"\* \* \* They point out that the Commission held that an allowance furnished a means whereby an industry enjoyed a preferential service not accorded to shippers generally, and constituted a refund or remission of a portion of the rate for transportation in violation of section 6 (7) of the Interstate Commerce Act. They assert these conclusions are insufficient to support a cease and desist order because the Commission has not found, as it must to bottom an order on sections 2, 3 and 15 (1) of the Act, that the practice was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. Respecting section 6 (7) they say that as, by that section and section 15 (13), allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sec-



tions mentioned the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates. \* \* \*

The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, 'or otherwise in violation of the provisions of this act', to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist."

The above decision and that in *United States v. Pan-American Petroleum Co.*, 304 U. S. 156, made plain that if a published "allowance" to shippers is in fact an unlawful refund, or rebate, the fact that it is published in the tariffs does not save it from the condemnation of section 6 (7) of the Act. And here there is not even the claim that the refunds are "allowances" paid to shippers for transportation services performed (R. 62). Another decision in which unlawful allowances,



although published in the tariffs, were held to be rebates in *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 511. There this Court said that

Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co. v. Interstate Commerce Commission*, 282 U. S. 720 \* \* \*.

To the same effect: *Int. Com. Comm. v. Baltimore & Ohio R. R.*, 225 U. S. 326, 345; *Chicago & Alton Ry. v. United States*, 156 Fed. 558, 560; *Cent. Railroad Co. of New Jersey v. United States*, 229 Fed. 501, 507-509; *Gallagher v. Pennsylvania R. R.*, 160 I. C. C. 563, 568.

In the excerpt above quoted from the Court's opinion in the *American Sheet and Tin Plate Co. case*, it will be noted that the appellees contended, among other things, that the Commission's conclusions under section 6 (7) were not sufficient to support its cease and desist order and they appeared to be of the view, somewhat similar to that of the lower court in this case (R. 68), that an order of the Commission had to be bottomed on findings of the Commission under sections 2 and 3 or other particular sections of the Act. The answer to that is, as appears in the Court's opinion, that section 15 (1) of the Act authorizes and requires the Commission to enforce the Act



by its orders if, after hearing, it is of opinion that any regulation or practice of a carrier is unjust or unreasonable or unjustly discriminatory "or otherwise in violation of the provisions of this Act."

In the present case, while the Commission's order rests in part on its finding that the refund is unlawful under section 6 (7), that finding is led up to and rests on its findings that the appellee's tariff practice is unreasonable and unlawful under section 1 (6) and that it conflicts with, and is violative of, section 6 (1) and (4) of the Act. Each and every one of these provisions is necessarily available to the Commission if it is to properly function in the everyday work committed to it of passing upon tariff provisions.

**II. The Right Which the Appellee, or any Railroad Serving the Mill Points, Has to Participate in (as "Free Traffic") the Outbound Movements of Products Processed From Seed Hauled Inbound by Other Roads Does Not Include the Right to Resort to "Self-Help" in Form and Manner Violating the Provisions of the Act Governing the Publication, Maintenance and Observance of Tariffs of Rates and Charges**

As pointed out in the preliminary statement, the appellee's tariff practice has, and was, apparently, designed to have, the effect in practical working of establishing it as party to through routes and joint rates without the concurrence of other railroads concerned. Under it, the appellee offers to refund a part of the local inbound rates on seed



hauled from origins to mill points by other roads and, when securing in this way an outbound shipment of processed products for movement to destination *via* its line, absorbs the refund so made out of its division of joint outbound rates to which it is a party. The refund paid by the appellee is in an amount which equalizes with the rates from country origin on the connecting road to ultimate destination on another, or perhaps the same, road, the net transportation cost to the shipper, if routing his shipment so as to include the line of the appellee; and the practical effect is, as above said, to establish the appellee as an intermediate line in a through route and joint rate with its connecting road, or roads, from country origin to final destination. In justification, apparently, of this result, the appellee relied before the Commission on this Court's decision in *Central R. R. Co. of N. J. v. United States*, 257 U. S. 247, and urged that its tariff was primarily a local tariff publishing transit privileges; that it named no rates but was simply a means to equalize the net charge to the shipper for the total haul from origin to destination. The Commission in its first report dealt with this contention by first quoting from the Court's opinion in the case in question, and thereafter making brief comment thereon as follows (R. 63):

"Under the rules of the Commission governing the making, filing and publishing of tariffs, privileges like creosoting in



transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of and without consulting, connecting carriers. And the whole revenue received for use of the privilege is retained by the local carrier.

“Based on the foregoing decision, the Columbus & Greenville would have the right to provide for a transit arrangement on its line. It could provide for the stopping of the commodity at the transit point and the subsequent shipment at the lawfully established joint through rate from original point of shipment to final destination, without the concurrences of its connections, but it could not establish the joint rate itself without such concurrences.”

In its final report the Commission also referred to the appellee's contention that its tariff simply established a transit privilege by equalizing with the rates applying on the seed and its products from origins on other roads to final destinations the net charge to the shipper for the total haul when its line was included therein (R. 7, 8) and,



thereafter, following its consideration of the testimony of the appellee's witness (R. 8, 9), its findings as to the appellee's practice (R. 9), and its summary of section 6 (1) of the Act (R. 10), it found, as above set out, that the appellee's tariff did not conform in form and manner to the requirements of section 6 (1) and (4) and section 1 (6) of the Act, and in the succeeding paragraph it stated that (R. 11):

“Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute.”

In short the Commission's findings were not directed against the end which the appellee's tariff was intended to accomplish. As first in effect stated in its earlier report, the Commission did not consider that the manner of accomplishing its end adopted by the appellee was sanctioned by the decision in *Cent. R. R. of N. J. v. United States, supra*, as a substitute either for the establishment of through routes and joint rates or the steps necessary to establish the out-bound rates on a proportional basis. Doubtless these steps were neither direct nor certain as to results but that fact did not justify the appellee's resort to “self-help” by means in conflict with the statute's requirements, nor could it warrant the Commission



in disregarding the violations of basic provisions of the Act involved.

In further justification of its practice of making a refund, or allowance, on seed originated and hauled to the mill points by other railroads, the appellee, it will be recalled, contended that, since the said originating and transporting roads made such refund, it had the right to make the same concession on the ground that under this Court's decision in *Atchison, T. & S. F. Ry. v. United States*, 279 U. S. 768, the in-bound carrier of the seed had no vested or inherent right to the out-bound haul of the products milled therefrom. The facts of the *Atchison Case* are given in a succinct illustrative statement in the headnotes which reads:

“The plaintiff railroad offered standard rates on wheat over its line from Dodge City to Kansas City, a primary grain market, and from Kansas City to the Gulf, and a through rate from Dodge City via Kansas City to the Gulf which was lower than the sum of the standard rates. Under the practice known as ‘through rates with transit privilege,’ owners of wheat which, within a certain period, had been shipped from Dodge City to Kansas City without other destination and for the standard rate between those points, could reship the same or substituted wheat from Kansas City to the Gulf by paying only a ‘proportional rate’ or ‘balance of the through rate,’ al-



lowing them a discount equal to the difference between the through rate from Dodge City to the Gulf and the sum of the standard rates. To overcome the competition of a railroad with a line from Kansas City to the Gulf which offered a lower rate from Kansas City to the Gulf on wheat which had originated in Dodge City, the plaintiff filed a tariff increasing its standard rate from Dodge City to Kansas City applicable only to such wheat as should later be reshipped from Kansas City to the Gulf over the competing line; and it contended that the Interstate Commerce Commission was without power to set aside the increase, though unreasonable and discriminatory, because, by so doing, it compelled the plaintiff to participate in a through route and rate with the competing carrier and thereby short-haul itself, in disregard of the limitations imposed by paragraph 4 of section 15 of the Interstate Commerce Act on the Commission's power to establish through routes."

The Commission found unreasonable and ordered cancelled the Atchison's proposed in-bound rate and its action was upheld, the Court holding that there was nothing in Section 15 (4)<sup>2</sup> of the

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<sup>2</sup> Section 15 (3) and (4)—set forth in the appendix—empower the Commission to establish through routes and joint rates when found to be in the public interest, subject to the proviso that it may not require any railroad to join in a through route that short hauls it except upon the findings prescribed in paragraph (4).



Act which restricted the Commission's authority to pass on the reasonableness of rates and that, as for the Atchison's contention that its proposed conditional in-bound rate was not filed as a just and reasonable rate but rather as a prohibitory rate in exercise of its section 15 (4) right to withdraw from a through route which short-hauled it (775), the contention rested upon a fiction, for the in-bound and out-bound movements of the grain in question were independent and distinct, and the fiction of a "through rate with transit privilege" could not convert them legally into a through movement. This decision in no way indicates that administrative judgment in respect of proportional rates, "transit balances" and the like, as predicated upon the fiction of a "through rate with transit privilege", is precluded or restricted but on the contrary emphasizes the broad authority of the Commission over rates and the fact that the general practice antedates the enactment of the Act to Regulate Commerce (606). The Atchison was asserting a special legal right and the answer made to this was that such a right could not rest upon a fictional basis.<sup>3</sup>

It is difficult to understand just why the appellee considers that the decision in the above case supports its claim of right, in competing for the

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<sup>3</sup> The decisions in *B. & O. R. R. v. U. S.*, 24 F. Supp. 734 and *B. & O. R. R. v. Settle*, 260 U. S. 166, 171 deal with another "legal" angle.



outbound traffic in question, to resort to the tariff means of holding itself out to refund a portion of the inbound rates of other roads if the shipment of the outbound products is made *via* its line. The tariff means adopted by the Atchison to hold the traffic to its line was, as above shown, to publish a "prohibitory" inbound rate to become applicable if the outbound shipment was made over the line of its competitor. Even though the Atchison had had the inherent right which it asserted to hold the traffic to its line, it is apparent that the decision recognizes that the tariffs are not available for its enforcement by way of a "prohibitory" rate since it would still have been within the authority of the Commission to declare it unreasonable and order it cancelled.<sup>4</sup> Moreover, the Atchison's experimentation with the tariffs was confined to its own rates.

Chiefly, it would seem, the appellee is attempting to attack in this case, in which its particular tariff practice alone is in issue, the validity of the "cut-back" tariffs of the other roads. This is made doubly apparent by its considerable reliance upon the decision in *United States v. Chicago, Milwaukee, St. P. & Pac. R. R.*; 294 U. S. 499. There the Milwaukee filed a schedule proposing to reduce its rates on coal from Indiana to the Chicago market to place them on a parity with the intrastate rates from origins in Illinois. The Commission, in a suspension proceeding, found

<sup>4</sup> Cf. *Virginian Ry. v. U. S.*, 272 U. S. 658, 666.



the Milwaukee's proposed rates unreasonably low and ordered them cancelled. This order of the Commission the Court reversed because of an inadequate basis in fact to support the finding. The Commission, in making the finding had relied considerably on its belief that the Milwaukee's proposed rate reduction would bring about a disruption of the coal rate structure and, while it expressed the view that the Illinois-Indiana rate adjustment might be in need of correction, it said that this should not be done in piecemeal fashion. The Court pointed out that it was within the power of the Commission to make such correction as was needed, whereas the Milwaukee had available to it only the means which it adopted of initiating reduced rates. It is this latter comment of the Court upon which the appellee principally relies, its position being apparently that the Commission should not have required its tariff to be cancelled, however unlawful it might have been, without first examining into the tariffs of the other roads, to meet the competition of which, it had resorted to the filing of such tariff. But the Commission's order in the *Milwaukee Case, supra*, was not set aside because it had not undertaken the correction of the Illinois-Indiana rate adjustment but because its conclusion of rate unreasonableness was not supported by adequate findings. And the method of "self-help" used by the Milwaukee



cannot be said to have any kinship to that employed by the appellee and involved in this case.

The Commission's statement that the tariffs of the other roads were not in issue was occasioned by the fact that much of the appellee's defense of its particular tariff practice consisted of an attack on the other roads' quite different practice. That the Commission did not consider the latter objectionable seems to follow from its finding that (R. 10, 11):

"Respondent provides the same cut-back for cottonseed originating on its line which it brings into the mill points as do the other carriers serving those points. No objection is made to that practice."

Furthermore, the Commission in its first report (R. 60) stated that "transit and similar arrangements, such as provided by these cut-back tariffs are generally conditioned upon, or granted in consideration of, the obtaining of the out-bound haul of the products by the in-bound carrier to the transit point." The Commission plainly did not consider that the appellee was incurring any greater loss of traffic from the truck competition than the other roads (R. 11, 60, 61), and it is apparent that it did not consider that the cut-back practice minus the variation initiated by the appellee called for investigation.



## CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the bill for want of equity.

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## APPENDIX

Interstate Commerce Act, 49 U. S. C. 1, et seq.:

SEC. 1. (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provision of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation be-



tween different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

SEC. 6 (4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the



parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

SEC. 6 (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any com-



plaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after



full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15. (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of the railroad and of any intermediate railroad



operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

SEC. 15 (13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and



allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.



No. 628

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**In the Supreme Court of the United States**

OCTOBER TERM, 1912

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INTERSTATE COMMERCE COMMISSION, J. M. KURN  
AND JOHN G. LONSDALE, TRUSTEES OF THE ST.  
LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND  
ILLINOIS CENTRAL RAILWAY COMPANY, APPEL-  
LANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,  
APPELLEE

---

*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
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BRIEF OF THE INTERSTATE COMMERCE COMMISSION  
OPPOSING MOTION TO DISMISS THE APPEAL OR TO  
AFFIRM

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This brief is filed by the Interstate Commerce Commission in opposition to the motion filed by the appellee "to dismiss this appeal, or in the alternative, to affirm as presenting no substantial question requiring further argument, under the provisions of Rule 7, Paragraphs 3 and 4."

I.

The appellee's first ground for its motion to dismiss the appeal is that:



“The appeal was not perfected within thirty (30) days as required by U. S. C. Title 28, Section 47 (Act of October 22, 1913, 32, 38 Stat. 220), which provides that appeals from an order granting or denying an interlocutory injunction after notice and hearing shall be *‘taken within thirty days after the order \* \* \*’* and *upon final hearing* of any suit brought to suspend or set aside, in whole or in part, any order of said commission *the same requirement as to judges and the same procedure as to expedition and appeal shall apply.*”

The appellee admits, however, that 28 U. S. C., section 47a, provides that:

“\* \* \* ‘A final judgment or decree of the district court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court \* \* \* if appeal \* \* \* be taken by an aggrieved party within sixty (60) days after the entry of such final judgment or decree, \* \* \* And in such cases the notice required shall be served upon the defendants in the case and upon the Attorney General of the State.’ ”

That the appeal here was taken from a final decree (R. 71) the appellee concedes. The point it makes is, apparently, that, since the statute contains the wording that upon final hearing “the same procedure as to expedition and appeal shall apply” as specified for in interlocutory hearing and injunction, this is to be read to require that



the appeal from a final injunction must be taken within 30 days even though the immediately succeeding sentence (38 Stat. 220) reads that:

“A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal be taken to the Supreme Court by an aggrieved party within 60 days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the Attorney General of the State.”

In view of this express provision allowing 60 days for an appeal from a final decree, it is apparent that the prior language is not to be taken to foreclose such right. The purpose of the prior language, so far as it relates to appeals, is, it is plain, to make the provision for *direct appeal* to the Supreme Court apply to the final hearing and appeal as well as the interlocutory hearing and appeal. And there is no occasion, therefore, to give it a reading in direct conflict with the express provision in the succeeding sentence.

The appellee, it is true, further urges that the provision

“And in such case the notice required shall be served upon the defendants in the case and upon the Attorney General of the State”



shows that the appeals which an aggrieved party is given the right to take within 60 days are limited "to those in which the State has some direct interest." But it is not believed that the statute can be read as leaving the right depending upon a "fine" differentiation between the orders of this Commission in the respect of the quantum of interest had by the State therein. The statute provides for notice to the attorney general and leaves to him the question of the State's interest. As for the practice under the statute: This Court's records will show that very many appeals have been taken after 30 days from entry of final decree, and without effort to establish just what was the interest of the State therein.

#### I-A

The appellee's second ground for its motion to dismiss the appeal is that the order allowing the appeal was signed by the District Judge only (R. 76), whereas, so it contends, the statute's requirements as to three judges "applies to all matters finally disposing of the cause, such as the granting of the petition for appeal \* \* \*"

The case of *Tagg Bros. v. United States*, 280 U. S. 420, involved a suit to set aside an order of the Secretary of Agriculture under the Packers and Stockyards Act, section 316 of which makes the Urgent Deficiencies Act "applicable to proceedings brought to restrain or annul orders of the Secretary" (p. 432). There an interlocutory in-



junction was first entered and subsequently the case was heard by the three judges upon final hearing. The opinion of this Court reads at p. 433:

“\* \* \* After considering it in connection with that which had been introduced before the Secretary, the court found for the defendants and entered a final decree dissolving the interlocutory injunction and dismissing the bill. 29 F. (2d) 750. The District Judge allowed an appeal to this Court under sec. 238 (4) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, U. S. C., Tit. 28, sec. 345 (4).”

The footnote indicated reads that:

“In doing so, he also approved an appeal bond to operate as a supersedeas and granted a temporary injunction pending the appeal. This part of the order, being beyond the power of a single judge, was later vacated by him. \* \* \*

It appears from the above that the order allowing an appeal, the right to which is expressly granted by the Urgent Deficiencies Act to an aggrieved party (*Int. Com. Comm. v. Oregon-Washington R. R. & Nav. Co.*, 288 U. S. 14, 24), is not such step as the statute requires be taken by the three judges, but is a step that may be taken by the District Judge. This being the case prior to the recent amendment of the Urgent Deficiencies Act (58 Stat. 198, 28 U. S. C. sec. 792), which would appear to cover and include such authority,



that amendment was not necessary to confer on the District Judge authority which he already had.

## II

In that part of the motion, asking that the lower court's decree be affirmed, the appellee, after setting out portions of the lower court's opinion and an excerpt from the appellants' jurisdictional statement, alleges that (pages 5-6):

"There is nothing in the entire record here, especially is there nothing in the decision of the District Court that affects joint rates. The District Court decided the issues presented under well-recognized principles of applicable law having to do with the reasonableness, justice, and nondiscriminatory character of the tariff of the Appellant, which affects only the Appellant and has nothing to do with joint rates, as was found as a matter of law."

The Commission's order here involved directs the appellee to cancel its tariff I. C. C. No. 81 to the extent that it "providee for refund, or cut-back, to the shipper on (cottonseed) traffic originated and hauled to mill points on its lines "by other rail carriers," but leaves it undisturbed so far as it provides for such refunds on seed which it hauls to the mill points itself (R. 10-11). By the tariff provision, found to be unlawful by the Commission, the appellee holds itself out to make such rate-refund on seed hauled to the mill points by other carriers, conditioned upon the "out-



bound" products processed therefrom being shipped *via* its line to marketing destinations. When securing in this way an "outbound" shipment for movement *via* its lines, the appellee absorbs the refund made to the shipper out of its division of joint "outbound" rates to which it is a party with other carriers. The appellee "is not a party to the inbound rates" involved "and no other carrier is a party to its tariff" offering the refunds. (R. 9.)

As judged by its allegation, above quoted, taken together with the portions of the lower court's opinion which it sets out, the appellee's position is that its tariff could not be found to be unlawful by the Commission since the refunds which it makes and itself absorbs neither affect the revenue received by the other carriers nor render its own divisions unprofitable and, since the rates (minus the refunds) were not found to be either unreasonable or unjustly discriminatory. But the Commission was not concerned with the questions as to whether the provision for the rate-refund would, if lawful, render the appellee's divisions unprofitable, or the rates borne by shippers unreasonable or unjustly discriminatory; nor is its authority limited to such character of unlawfulness. *United States v. American Sheet and Tin Plate Co.*, 301 U. S. 402, 406-407. The Commission's immediate concern was with the question as to whether the tariff provision was lawful as one conforming to the basic requirements of the Act



governing the publication, maintenance, and observance of tariffs of rates and charges. The Commission found that it was not and its finding is amply supported by facts and reason.

The appeal from the lower court's decree setting aside the Commission's order presents questions which the Commission believes are very substantial both in respect of the merits and its authority over the tariffs filed with it and it, therefore, asks that the appellee's motion be dismissed.

DANIEL W. KNOWLTON,  
*Chief Counsel,*  
*Interstate Commerce Commission.*

DANIEL H. KUNKEL,  
*Principal Attorney,*  
*Interstate Commerce Commission.*



No. 628

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In the Supreme Court of the United States

OCTOBER TERM, 1942

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INTERSTATE COMMERCE COMMISSION, J. M. KERN  
AND JOHN G. LONSDALE, TRUSTEES OF THE  
SOUTHERN SAN FRANCISCO RAILWAY COMPANY, AND  
THE PACIFIC CENTRAL RAILWAY COMPANY, PETI-  
TIONERS

v.

COLUMBIA AND GREENVILLE RAILWAY COMPANY,  
APPEELEE

---

*Writ of Habeas Corpus, and Writ of Certiorari,  
Filed for the Northern District of Texas and  
Eastern Division*

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ON REARGUMENT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

MAY 1943.

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(I)



# **In the Supreme Court of the United States**

OCTOBER TERM, 1942

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No. 628

INTERSTATE COMMERCE COMMISSION, J. M. KURN  
AND JOHN G. LONSDALE, TRUSTEES OF THE ST.  
LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND  
ILLINOIS CENTRAL RAILWAY COMPANY, APPEL-  
LANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,  
APPELLEE

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI,  
EASTERN DIVISION*

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ON REARGUMENT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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## **FOREWORD**

This case was argued April 7 and 8, 1943, and on April 19, 1943, was, by order of the Court, restored to the Docket for reargument with the request that counsel, on the reargument, direct their attention particularly to the following questions:



(1) Is freight tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

(2) Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

(3) What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?

(4) Have the courts power to require the Commission to take such procedure?

This brief adopts, and respectfully refers the Court to the Commission's earlier brief, for the statement of the case and for argument in respect of question (1) except as herein supplemented, and covers under separate headings questions (2), (3) and (4).

**(1) Is Freight Tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?**

As shown in the preliminary statement of the Commission's earlier brief, the appellee railroad, whose line extends from Columbus, Mississippi,



across the State to Greenville, Mississippi, serves together with other railroads certain mill points where cottonseed transported from country origins in Mississippi and other States is processed into products which subsequently are transported to marketing destinations. In 1931, for purposes of meeting truck competition, the appellee and the other railroads (and, in fact, all railroads in Mississippi and nearby States) established so-called cut-back tariffs, whereunder each road provided for a rate-refund on inbound shipments of seed hauled by it to the mill points upon the condition that the outbound shipments of processed products be made via its line, the proffered refund being in the case of each road similarly computed and based on the weight of the inbound shipment and length of haul from origin-to mill point (R. 9, 59).<sup>1</sup> The outbound rates on the products, local and joint, were "one level" rates, but, in order to become entitled to the refund on his inbound shipment of seed, the shipper had to reship via the same road which hauled the seed to the mill point, making proof of this by presentation of paid inbound freight bills.<sup>2</sup> Despite this condition, however, it will be seen that, under the said uniform cut-back tariffs, the rates on seed from origins equally distanced from the mill points were the same regardless of the road

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<sup>1</sup> Item 5 (d) and item 40 of Tariff No. 81, R. 7.

<sup>2</sup> Item 40 of Tariff. R. 7, 57, 58.



inating and hauling inbound, and, as coupled to the outbound rates on the products, the same on any of the roads, resulted in an entirely uniform basis of rates. While the appellee railroad did not at the time offer a cut-back reduction in inbound rates on seed of the other roads connected upon the outbound shipments of the products processed therefrom being made *via* its line, none of its connecting roads was on any better competitive "footing" in respect of the outbound traffic in such products, either as processed or seed hauled inbound by the appellee, or from seed hauled inbound by any road other than itself, is, the particular road in fact making the inbound haul.

However, the appellee, by its tariff No. 81, in 1938 and here under consideration, did make just such a provision as described, that is to say, it extended the provision of its earlier tariff, offering the cut-back reduction in inbound rates on seed when the outbound shipments of the products are made *via* its line, to apply even though the inbound shipments of seed to the mill were carried by another road (R. 60). It was this application of the appellee's tariff which the Commission condemned as violative of the Act.

It was not condemned on the ground that the rates, minus the refund made to the shipper, were either unreasonable or unjustly discriminatory or preferential, but because the tariff pro-



vision, whereunder such refund—working the rate reduction—was made, was unlawful in violation of section 6 (4), 6 (7), and 1 (6) of the Act.<sup>2</sup>

In its first report the Commission dealt largely with the appellee's tariff in its effect on the joint outbound rates through which the appellee reached the marketing destinations. It there said that the effect of it was to reduce the lawfully published outbound rate without the concurrence of other carriers participating in the outbound haul; that in view of section 6 (4) of the Act, the appellee, acting alone, could not law-

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<sup>2</sup> The provisions of the Act involved are given in full in the appendix to the Commission's earlier brief.

Section 6 (4) requires that the several carriers which are parties to any joint tariff shall be specified therein and that each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission.

Section 6 (7) is the provision of the Act which forbids the carriers from engaging in any transportation unless the rates and charges covering same have been filed and published in accordance with the provisions of the Act; forbids any departures whatsoever from such rates or charges; and provides that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

Section 1 (6) makes it the duty of all common carriers, subject to the Act, to establish, observe, and enforce just and reasonable regulations and practices affecting classifications, rates or tariffs, and prohibits and declares unlawful every unjust and unreasonable classification, regulation, and practice.



fully reduce such joint rates (R. 62); that the refunds held out by the appellee constituted a "device" by means of which the appellee refunded a portion of the joint outbound rates in violation of section 6 (7) of the Act (R. 65); and that the granting of an *alleged* allowance to the shipper notwithstanding that he performs no part of the transportation service, as the result of which he obtains the outbound transportation at less than the rates lawfully in effect, constituted an unreasonable practice in violation of section 1 (6) of the Act.<sup>4</sup>

In its final report the Commission dealt particularly with what was the appellee's principal justification in the second proceeding, saying in substance (R. 7) that the justification offered by the appellee for its tariff No. 81 was that it was

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<sup>4</sup> Tariff No. 81 became effective without suspension but, it being later criticized by the Commission's Bureau of Tariffs, the appellee filed "proposed" Tariff No. 83 to take its place, which was suspended and was the tariff dealt with by the Commission's first report (Commission's 1st Brief, pp. 5-6). The only differences between this proposed tariff and tariff No. 81 were that the "cutbacks" were termed *allowances* instead of refunds and, instead of being specifically provided for on the inbound shipments of the other roads, were in effect provided for on any inbound shipments moving *via* rail (R. 58). As stated in the Commission's final report, dealing with tariff No. 81 (R. 6): "There is no difference in substance and effect of the tariffs. Each of them provides a cut-back to the shipper of outbound cottonseed products from the mill point upon surrender of inbound freight bills of other carriers for the transportation of cottonseed from origin to the mill point in settlement of claims."



primarily a local tariff publishing rates and rules governing transit privileges;<sup>5</sup> that it published no rates on the movements, the rates both inbound and outbound being published in tariffs, local or joint, governing the movements; that, instead, it incorporated a transit privilege which, by adjustment through claim channels, equalized the net charges to shippers; that the privilege was granted at the appellee's sole expense and for the sole purpose of equalizing the net cost to the shipper of the outbound movements of the products from mill points to destinations;<sup>6</sup> that, in short, its tariff refund was only a means to equalize with the rates over routes of competing carriers result-

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<sup>5</sup> Appellee apparently relies largely on *Central R. R. of N. J. v. U. S.*, 257 U. S. 247, shown not to be applicable by the Commission's first report (R. 63) and dealt with in the Commission's prior brief (pp. 12, 13, 41-43). In this connection the appellee's brief in this Court states (19) that the tariff grants the shipper a transit privilege "to permit his election of routes over which joint rates are in effect, the cost or burden of the privilege being upon appellee alone from its general revenues." There are no joint rates in effect from origins of the seed on the other roads through the mill points and via the appellee to final destinations. This appears from both reports (R. 10, 63) and, therefore, it is clear that the statement has reference to the joint outbound rates on the products to which the brief also refers (p. 6). But it requires no "grant of privilege" from the appellee to give the shipper the benefit of these rates, since they are already applicable.

<sup>6</sup> The rates on this movement, namely, the joint outbound rates, the appellee apparently concedes would be affected by its tariff and, in fact, its complaint alleges that its "effect is to reduce the outbound rate on cottonseed products to meet a competitive situation • • •" (R. 3).



ing from their cut-back tariffs the net charge to the shipper as made up of the rate for the inbound movement of seed to the mill point (of connecting roads)<sup>7</sup> and of the rate for the outbound movement of products to destination over routes of the appellee and its connecting lines; and that the resultant net charge is identical with that available over routes of competing carriers (R. 7-8).

After outlining this justification by the appellee of its tariff, the Commission gave consideration to testimony (R. 8-9) describing its operation with respect to an inbound rate of a connecting road, the Y. & M. V., and outbound rates over a through route from a country origin on the Y. & M. V., to an ultimate destination reached both over the Y & M. V., and under joint outbound rates via the appellee. While, in giving this testimony, the witness clearly showed that the appellee's only participation in the through route was as initial carrier in the outbound movement from the mill point and under joint outbound rates, he at the same time also insisted, in effect, that the "privilege" granted the outbound shipper by the appellee's tariff was not different than that given by

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<sup>7</sup> Since that part of the tariff which was in issue was its provision (Item 5 (b), R. 6-7) for a rate refund by the appellee on seed from origin on, and hauled inbound to the mill points by, its connecting roads, the appellee was not, of course, included in the inbound "leg" of the through routes; it was included only as intermediate carrier—the initial carrier in the outbound "leg."



the tariff of the Y. & M. V., both refunding to the outbound shipper the difference between the Y. & M. V.'s local inbound rate and the cut-back rate, termed by the witness "a fictional rate." The insistence of the witness here that the appellee's tariff operated the same as that of the Y. & M. V., and that both were fictional was, apparently, to give support to the appellee's contention (hereinafter described) under the decision in *Atchison, T. & S. F. Ry. v. United States*, 279 U. S. 768.

After outlining the appellee's general justification and, directly following the witness' testimony (R. 9), the Commission stated and found that the appellee was not a party to the inbound rates on seed from points on its connecting roads and no other railroad was a party to its tariff No. 81; that, while the refunds or allowances held out in its tariff were identical in amount as those of the other roads, the difference in the appellee's practice and that of the other roads was that it made an allowance on *seed* that did not originate on its line and absorbed the allowances so made out of its proportion of the outbound rates (on the products) to which it was a party. Following this, the Commission further discussed the appellee's contentions and, in connection with its contention under the *Atchison Case*, *supra*, which was to the effect that it had the right, when an outbound carrier competing for the outbound products to offer the same concession as did the connecting road or roads, originating and haul-



ing the seed inbound to the mill point, it (the Commission) said, that, while the legality of the tariffs of the connecting roads was not in issue, it considered the distinction they made to be important, namely, that the appellee's tariff

“attempts to name rates for account of their lines without their concurrence whereas their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point.”

Following its outline of the appellee's justification of its tariff as a transit privilege and testimony of the witness, its findings as to the appellee's practice and discussion of contentions and other matter just mentioned, the Commission referred to certain of the provisions of section 6 (1) of the Act in their application to the appellee's tariff, saying, among other things, that (R. 10)—

“Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4) of the act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act.”



The transit privilege, advanced as the appellee's principal justification, that is, the above-described tariff means (or the provisions constituting the means) adopted by the appellee to equalize the rates over routes including its line, it is plain, is the form and manner of tariff publication which the Commission found did not conform to the requirements of section 6 (1) and (4). There being no joint rate over the routes from origins on the connecting roads through the mill points and via the appellee to marketing destinations, the inbound local rates of the connecting roads and the joint outbound rates to which the appellee was a party met the requirements for separately established rates.\* There is no question but that they are lawfully established (R. 8), and they could not be lawfully displaced by provisions such as described in appellee's individual tariff (R. 7), either as amounting in practical effect to the establishment of the appellee as an intermediate line in through routes and joint rates with its connecting road or roads, or, on the other hand, as effecting a reduction in the joint outbound rates down to a proportional basis (Prior Br., pp. 16, 40-41), which latter the appellee seems to admit and, in fact, alleges is what is done by its tariff No. 81 (R. 7, 3). The ac-

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\* These rates are "locals" in the sense that they apply to local as well as through transportation, but a combination through rate may be made up wholly of locals, or wholly of proportionals or combinations of both. *St. Louis S. W. Ry. Co. v. U. S.*, 245 U. S. 136, 139.



accomplishment of either of these things by direct means requires not only the concurrence of participating carriers (*Central R. R. of N. J. v. U. S.*, 257 U. S. 247, 255; R. 63; Appellee's Br. 6), but also tariff provisions conforming to what is in such case expected and required by the Act and necessary for its administration. This being so, it may be said that the accomplishment in practical effect, as here, of the same, or much the same, things by indirect means would quite certainly result in violations of the Act; and the fact that the appellee's tariff has here had such result can, it is believed, be readily shown.

#### **The Inbound Rates of the Appellee's Connecting Roads**

In its determination that the appellee's tariff was unlawful, it is plain that the Commission had to give consideration first to its provision for reduction, by way of the refund, in the inbound rates of its connecting roads. This provision being express, if the Commission could have given it legal application as worded, it would not have been necessary to look beyond to any other rates. However, it does not follow from the fact that the Commission could not give it legal application, or any effect whatsoever, on the rates to which it was directed, that the provision itself could only be violative of the Act's requirements if, with respect to some other rates, it were determined that it did effect illegal changes. The consideration that a departure from the joint outbound rates is



in fact effected by the tariff provision is, doubtless, the consideration of primary importance in the case in view of the policy of the Act in that respect. Nevertheless, there are issues here involved and purposes of the provisions of the Act in question quite apart from the actual effect of the tariff on rates; and these are specially important to the workable administration of the Act, for clearly tariff provisions cannot stray far afield from the requirements of the Act, set up to govern them, without consequences extending to the administering of the rate provisions throughout the Act. That this is so is well illustrated by this case. The appellee here alleges that the rates resulting from its tariff are entirely reasonable and nondiscriminatory and, apparently, believes that any authority to order its tariff canceled must be bottomed on findings to the contrary. At the same time it alleges that its tariff publishes no rates of inbound roads and further that it publishes no joint outbound rates although it admits that its effect is to reduce those rates. In these admitted circumstances it is plain that the Commission would be confronted with an unworkable situation in any attempt to apply to the rates resulting from the appellee's tariff the provisions of sections 1, 2, 3, 15 (1), or any other of the rate provisions of the Act. In undertaking to do so, it would, of course, be looking beyond the inbound rates; and, in this connection, it should be kept in mind that it would not be considering the



question of the legality of the tariff as such but, in conformity with the appellee's suggestion, would be accepting the legality of its effect on the joint outbound rates and, therefore, would simply be looking into the rates resulting from the tariff to determine whether they were reasonable and nondiscriminatory. If, however, determining to the contrary—that is, if simply determining that such rates were unreasonable and discriminatory—without consideration of the tariff provisions as such, that would call for an order requiring a different cut-back to be carried out by the indirect and illegal means provided for in the tariff including the sanctioning of it as a cut-back in the inbound rates of the other roads. Of course, the most unworkable feature of the appellee's tariff in any such proceeding would be with respect to the joint outbound rates which are illegally affected and the Commission would be ignoring, but even assuming that the tariff would have valid operation on the joint outbound rates, if directly provided for, it is still plain that the Commission would not be expected to sanction it as it stands. Whether, as here, it was an essential part of the appellee's plan or whether that was not the case, the provision is in conflict with the Act's requirements and its proper administration and the motive behind it would not seem essential in such case before requiring its cancellation.



Another angle involving particularly the inbound rates of the other roads, although also involving the effect of the tariff on the joint outbound rate, is that the publishing of the cut-backs, not simply as in amounts based on the inbound rates, but as in fact reductions in those rates, was essential to the appellee's plan of tariff publication. While it was necessary for the tariff to use the inbound rates and shipments as a basis for the rate equalization effected, it was not, of course, necessary for that purpose to publish the cut-backs as reductions in the rates themselves. The necessity for that appears in the appellee's brief in this Court, in which it very frankly states (pp. 6-7), as it also did before the Commission, that its reason for adopting its plan of tariff publication was that the alternative of seeking to have the joint outbound rates established on a proportional basis would require a complex publication of rates and many concurrences, and, further, that the question is not whether some other plan would accomplish the same results but whether its present tariff is lawful. However, all, or substantially all, that the appellee has advanced in support of its tariff is that it is a transit privilege, that it is necessary to meet the competition of the cut-back tariffs of the transporting roads and does not discriminate against shippers. The latter defense simply clouds the issues. The reports make very plain that the Commission has



never considered that the appellee's tariff resulted in any different rates, or "charges" than those available to shippers under the cut-back tariffs of an originating road. But any inference that the appellee's tariff supplies shippers with rates not already "at hand," is, of course, contrary to the fact. It simply makes rates which are already available to the shipper further available over routes including the appellee's line. As for the appellee's other justification of its tariff, the first one, that it constitutes a transit privilege within the ruling of *Central R. R. of N. J. v. United States, supra*, need not be discussed again as it has already been referred to in this brief and was dealt with in the Commission's prior brief (p. 12. 41). The second one, that its tariff, providing for cut-back reductions in the inbound rates on seed of an originating and transporting road, is necessary to meet the cut-back tariff of such road in competing for the traffic in the outbound products, is not a sound defense. The defense of competition could not make its tariff a legal tariff either as "naming" the rates of other roads or as establishing the cut-backs as a valid change in the joint outbound rates. This the appellee would seem to admit. Its bill of complaint alleges (R. 3) that its tariff *effects* a reduction in the outbound rates and it nowhere contends that it makes the change in the rates themselves, but appears clearly to admit, if not to allege, the contrary (R. 8). And its position has consistently



been that its "tariff publishes no rates for application on the inbound movements" (R. 8).

In connection, however, with this latter concession of the appellee, it will be seen that it embraces the position that its tariff does not even publish rates on its own inbound hauls of seed, which brings to mind the testimony of its witness before the Commission (R. 9) that the cut-back tariff of the Y. & M. V., applying on an inbound shipment hauled by itself nevertheless published a fictional rate. In doing this, it will be recalled, the witness was, by direct inference at least, placing the Y. & M. V.'s cut-back tariff in the same category as the tariff of the appellee which purported to publish a cut-back reduction in the same rate; that is, the inbound rate of the Y. & M. V. While the appellee's cut-back tariff is, in truth, fictional, that of the Y. & M. V. and its own, when transporting the inbound shipment, are fictional only in the sense referred to in the *Atchison case, supra*, the *Central R. R. of N. J. case, supra*, and still other earlier cases. The appellee doubtless appreciates the distinction and, in any event, its tariff would not be shown to be legal even were the tariffs of the other roads equally fictional and equally invalid in other respects. However, the reference here to the "play" made by the appellee on the word "fictional" is not so much intended to emphasize the manifest difference between the two tariffs, classed by the appellee as "fictional", but rather



size that the express publishing by the tariff of the cut-backs as applying on and rates of other roads was essential to plan. As alleged by the appellee, the of having the joint outbound rates on a proportional basis (by a complex calculation calling for the concurrences of ing carriers) was the occasion for its ring about such equalization, or reduction, in those rates by the tariff planed. It could not publish the cut-backs y applying on the joint outbound rates oing it in the form and manner required 6 (4); that is, by a tariff specifying of the participating carriers and their concurrences, and, therefore, it em- individual tariff" publishing the cut- pplying on the inbound rates of its con- ads. The "naming" of the cut-backs g on the said inbound rates was, there- tial to, and inseparable from, the ap- sole plan of tariff publication to effect a in the joint outbound rates, but the xplained by the appellee itself, seems, ore, to constitute a concession of viola- tion 6 (7) practically in the words of alleged by the appellee, this tariff is not a joint (19), its use is distinctly defeative of the pur- on 6 (4) because as found by the Commission g in form and manner to the requirements of 6 (4) or section 6 (1).



the statutory prohibition. The appellee is, of course, mistaken in its view (Br., 24) that the statute forbids only those rebates which are "secret."

#### **The Joint Outbound Rates**

The findings in the Commission's first report of the violations of the Act effected by the operation of appellee's tariff on the joint outbound rates have already been referred to and were dealt with in the Commission's prior brief (pp. 32-40). They are explained in detail in the first report together with full statement of underlying facts and circumstances furnishing the background for the final report. The said findings are plainly adopted and embodied in the findings of violations of the same provisions of the Act found by the Commission in its final report (R. 10, 11). The appellee's justification of its tariff as a transit privilege granted at its expense and "solely for the purpose of equalizing the net transportation cost to the shipper of the product from mill point to destination" is set forth in the Commission's final report (R. 7) describing the appellee's justification of its tariff as a transit privilege, or tariff means for equalizing the rates. The reports specially important findings are directed to the tariff's operation both in respect of the inbound and joint outbound rates, that is, to the tariff's operation as a whole (R. 9). Those findings are substantially that the appellee is not a party to



the inbound rates on seed from origins on its connecting roads and that *no other road is a party to its tariff* providing for the refunds; that, while the refunds, or allowances, are exactly the same in amount as those of the other roads, the difference between its practice and that of the other roads is that it makes an allowance on seed that does not originate on its own line and *absorbs the allowances so made out of its proportion of the outbound rates to which it is a party.*

The finding that no other road is a party to the appellee's tariff offering the refunds, it is clear, refers both to the inbound roads and the roads, parties with it to the joint outbound rates. That the finding that the refunds "are exactly the same in amount," is made in recognition of the fact that they are used to effect the reductions in the joint outbound rates, already explained by the Commission in outlining the appellee's "justification," is made plain by the finding that they are absorbed out of the appellee's proportion, or division,<sup>30</sup> of the joint outbound rates *to which it is a party.* And, of course, it follows from the

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<sup>30</sup> The appellee's justification states that the expense of the equalization is borne by it (R. 7) and its brief (p. 19) alleges that such expense is borne out of its general treasury. Assuming this latter to be the fact, it would show all the more clearly that the refunds were used simply "to buy traffic." However, the statement is not readily reconcilable with the appellee's testimony (R. 68) that the tariff is profitable to it, for it seems clear that the appellee must look for any net profit to its divisions from the joint outbound rates.



fact that the refunds were absorbed out of the appellee's divisions that they were not *absorbed* as valid reductions from the rates, the other participating roads not having concurred in the appellee's individual cut-back tariff. As above stated, the final report was written in reliance on the stipulation that the record and findings of fact in the prior proceeding be made a part of the record in the final proceeding (R. 6), and it was in light of such background that the above findings were made and also the succeeding findings of violations of the provisions of the Act (R. 10) and the ultimate findings (R. 11). The findings of violations of the Act were made after summarizing section 6 (1), and were that:

"The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4) of the Act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act."

As above indicated, the form and manner of tariff publication to which the Commission refers is the plan of tariff publication employed by the appellee. As there explained, the appellee adopted its plan of tariff publication because of the difficulties in having the outbound rates established on a proportional basis, that is, the requirement, in order



to conform to section 6 (4), of a complex tariff publication specifying the participating carriers and requiring their concurrences. The appellee, therefore, could not publish the cut-backs as directly applying on the joint outbound rates without doing it in the form and manner so required by section 6 (4), that is, by a tariff specifying the names of the participating carriers and obtaining their concurrences, and therefore, it employed its individual tariff publishing the cut-backs as applying on the inbound rates of its connecting roads, when the movements of outbound products were made *via* its line. This, it is plain, supplied warrant for the Commission's finding that the tariff did not conform to the requirements of section 6 (4). As for the finding that the tariff did not conform to section 6 (1), it has already been pointed out that the inbound rates of the connecting roads and the joint outbound rates met the requirements of section 6 (1) for separately established rates in the absence of a joint rate. The appellee's tariff could not displace these rates either in its express provision publishing the cut-backs as reductions in the rates of the inbound roads or in its indirect application of effecting the reductions in the joint outbound rates. And the reason that it could not do so was because it did not meet the requirements of that paragraph, even remotely. While section 6 (1) is referred to in the first report, it is not there found that the tariff did not meet its requirements, but it is so



found in the final report and it is clear that it applies both to the express operation of the tariff on the inbound rate and its indirect effect on the joint outbound rates.

The tariff, in its express "naming" of the inbound rates of other roads, does not fit into the violation of section 6 (4) as well as it does in its effect on the joint outbound rates. And yet it is indisputably defeative of the requirements and purposes of both section 6 (1) and (4), for the only way either of those paragraphs contemplate that one railroad may include itself in the published rates of another is by a joint tariff publication conforming to section 6 (4). The Commission's finding that the refunding, or attempted refunding, of the rates of another road was a tariff practice made unlawful by section 1 (6) applies, of course, to the tariff in its express application to the inbound rates. This, however, cannot be dismissed, as appellee would have it, for absence simply of the word "unreasonable". A finding under the paragraph of the Act in question that a practice is unlawful both conveys and carries the meaning that the practice is found to be unreasonable. This leaves for consideration only the finding of violation of section 6 (7), and this finding leaves no doubt that the tariff in its effect on the joint outbound rates is embodied in the report's findings of violations of the Act, for the reason that it is through the joint outbound rates that this ultimate violation is worked. As explained



above, the tariff's express "naming" of the cut-backs as applying on the inbound rates was essential to its plan of tariff publication but the ultimate departure from the lawfully published rates was effected and worked in the joint outbound rates.

**(2) Assuming Question (1) to be answered in the affirmative, would the cancellation of the appellee's tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?**

Since the above question of the Court applies only on the assumption that the appellee's tariff plan of effecting reductions in rates is illegal as found by the Commission, it is understood to call primarily for an expression of views as to the steps or procedure which would be open to the appellee to establish itself in routes carrying rates enabling it to compete on even rate terms for the outbound traffic in cottonseed products. The appellee points in its brief (p. 6) to the method open to it by tariff publication designed to establish the joint outbound rates to which it is a party on a proportional basis. Whether the difficulties in meeting the appellee's need for market outlets by voluntary means are as discouraging as pictured is probably a question that had best be left to counsel for the appellee and the intervening roads. In the matter of steps open to the appellee before the Commission, consideration



will be given first to a complaint proceeding for the establishment of through routes and joint rates under section 15 (3). Cf *United States v. Mo. Pac. R. R. Co.*, 278<sup>8</sup> U. S. 269. In the latter case the complaint was brought by the Ft. Smith, Subiaco & R. I. Railroad. The complainant was a so-called "weak carrier", whereas the record does not indicate that the appellee would be classed as such. The right to bring such a complaint, however, is open as much to the appellee as any railroad. And, since section 15 (4) has now been amended to preclude the establishment of through routes for purpose of assisting any carrier in meeting its financial needs, no advantage would, in any event, attach to a complainant having the status of so-called "weak carrier."

While section 15 (4) is the provision embodying what is commonly referred to as the "long-haul" right of an originating carrier, it is in fact a paragraph limiting the Commission's authority to establish through routes involving such long-haul rights to situations or circumstances where certain prescribed findings can be made. However, the appellee's reliance upon the decision in the *Atchison Case*, *supra*, for its contention that the outbound traffic in products processed from seed hauled inbound by its connecting roads is "free traffic" for which it has the right to compete on equal terms as to rates is predicated on the assumption that here as in that case the "long-



haul" right of the originating roads would not exist. Accepting that assumption as correct, it would follow (subject to consideration to be later mentioned) that the restrictions imposed by paragraph (4) on the Commission's authority under paragraph (3) would be removed and it could, similarly as in any case, establish through routes upon finding the same to be in the public interest.

While the appellee's general position that the outbound traffic here involved is "free traffic" is probably correct, if it is proceeding on the assumption that an originating road is not within its rights in reducing its rates for competitive reasons, that meaning is not to be found in the term "free traffic" under the decision in the *Atchison Case, supra*. There, as pointed out in the Commission's prior brief (pp. 44-47), the Atchison, in exercise of its asserted right under section 15 (4) to withdraw from a through route which short-hauled it, filed an inbound rate on grain higher than its inbound local which was conditioned to apply in case the outbound products of the grain were reshipped over the line of its competitor, the Kansas City Southern. In proposing the rate the Atchison made clear that it was not filed as a just and reasonable rate but as a rate made purposely high to prevent the outbound traffic from moving over the line of its rival, it taking the further position in this connection that the Commission was without authority to order the rate canceled as unreasonable, for, to do so,



would deprive it of its long-haul right. When considering the meaning of the term "free traffic" as used in the *Atchison Case, supra*, it is this contention of the Atchison that must be kept in mind. For it is clear that this Court, in overruling the contention by sustaining the Commission order did not hold that the Atchison could not have used the usual competitive means to hold the outbound traffic to its line, as, for example, a further reduction in its rates. All that it held was that the Atchison could not file a rate made purposely high to prevent the outbound traffic from moving over the line of its rival and, by doing so in reliance on its long-haul right, take from the Commission its authority to pass on the reasonableness of the rate and, if finding it unreasonable, order it canceled. This holding was based in part on the ground that since the inbound and outbound movements were separate and distinct, there was no through movement and, therefore, no special right in the carrier by virtue of paragraph (4), and in part on the further and important ground that it was, in any event, within the Commission's authority to pass on the reasonableness of the rate proposed.

In short, there is nothing in the *Atchison* decision to warrant the thought that, in the situation here, an originating road, just because it is such, may not reduce its rates in reliance upon its usual competitive right to do so. It cannot place them outside the Commission's regulatory authority by rates made so low for competitive reasons that



they would be "destructively low" (this term being used only for purposes of contrast) any more than the Atchison could achieve such result by its prohibitively high conditional inbound rate, but within the bounds of rates, neither unreasonably low nor unjustly discriminatory, there would seem to be no reason to believe that such a road is deprived of the right had by any road to establish and maintain competitively low rates simply by reason of the fact that it cannot assert its special right under section 15 (4).

Using the *Atchison Case* for comparison here with the inbound cut-back rate of an originating road, the Atchison's proposed inbound rate was higher than its local inbound rate and the tariff made it applicable if the products of the grain were shipped outbound over the line of the rival road. The Court's holding in these circumstances that the Atchison had no right to recapture the traffic and that the outbound products were "free traffic" would seem to mean simply that the Atchison could not rely on its paragraph (4) right as precluding the Commission from ordering the proposed inbound rate cancelled as unreasonable.<sup>11</sup>

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<sup>11</sup> The statement in the *Atchison Case*, *supra* (p. 776), that "To call the rate proportional is misleading" is shown by a footnote to refer to the fact that instead of being lower, it was higher than the locals. This is further shown by the statement at pp. 773-774:

"\* \* \* Moreover, to make an additional charge for having brought merchandise into a city if it should after-



In contrast, the inbound cut-back rate here is a rate lower than the local and made to apply if the products are shipped outbound over the line of the road hauling the seed to the mill point. The "recapture" of the traffic in such case, therefore, is not attempted by virtue of a special right or of any right, except that to maintain rates below the local rate, both on the principle that they apply on a through movement and for competitive purposes, including the purpose of "recapturing" the outbound traffic for movement over the line of the road making the inbound movement. But such "recapture" is not the same as in the *Atchison Case*, for all that is asserted is the right to maintain rates lower than normal for competitive purposes, subject to the Commission's authority to require them increased, if unreasonably low. The traffic is "free traffic" for which the appellee or any outbound road may, similarly as the outbound carrier in the *Atchison Case, supra*, (772), compete by meeting through a reduction in their outbound rates the cut-back in inbound rates of the rival road.<sup>12</sup>

wards be shipped out, is on its face unreasonable. And it is discriminatory to make that additional charge only if the outbound shipment is over one of several possible railroads \* \* \*."

<sup>12</sup> Such cut-back tariffs are not new. They are employed very extensively in certain Southern States and are asserted to be particularly well fitted for certain traffic and to meet truck competition. *Laurenceville Cooperage Co. v. Akron, C. & Y. Ry.*, 235 I. C. C. 155, 163 (226 I. C. C. 773, 790).



The above, it is believed, shows that the difficulties confronting the appellee are not because the "recapture" of the outbound traffic here is in any way like that referred to in the *Atchison Case*, *supra*, but is because, unlike the rival outbound road in that case, it does not reach the marketing destinations by its own rails. The situation is therefore that the steps open to the appellee are, either to secure the cooperation of the other carrier parties to the rates, or to ~~h~~<sup>e</sup>voke the remedies given it by the Act. Of these the remedy of seeking the establishment of through routes and joint rates seems preferable to such others as there might be for the reason that, with the routes as well as rates in issue, a better perspective of the general situation is had, and perhaps particularly because the one factor through rate would "spread" the effect of meeting the competitive rates involved.

In undertaking such a proceeding, it seems likely that considerations of the Commission's authority would be involved. As above said, if the circumstances at the mill points here are the same as involved in the *Atchison Case*, *supra*, then section 15 (4) does not apply as a restriction upon the Commission's authority under section 15 (3), but under that decision there would still remain the question as to whether the through traffic would be of a kind upon which the Commission's through route and joint rate authority might be



predicated. It is the opinion of counsel that the Commission's authority would attach. With such situations embodied in the rate structure throughout the country, now and for many years past, it would seem that the section 15 (3) procedure was applicable. And with the paragraph (4) right of the carriers in any case eliminated in such situations, the question would appear to be one simply of procedure. In any event such procedure may be assumed to apply in further answering the Court's questions.

Probably the real difficulty is not because of the paragraph (4) right of the railroads, which, as above stated, is simply a limitation upon the Commission's authority under section 15 (3). The real difficulty, if it may be called such, arises from the fact that in any situation involving the right of the railroads to meet competition by reduced rates, the Commission's authority is quite different than that which it has with respect to the maximum reasonableness of rates. This the Court well knows and it is mentioned here because, in giving consideration to the fairness of the situation to the appellee and the effectiveness of the remedies available, the question seems to narrow down to such competitive right of the carrier and the policy of the Act on which it rests which is, subject to well-known limitations, to leave the carriers free to compete, this because of the benefits of such competition to shippers



generally. *Texas & Pacific Ry. v. United States*, 289 U. S. 627; *Texas & Pacific Ry v. Int. Com. Comm.*, 162 U. S. 197. The fact that the question does narrow down to such competitive right, or very largely so, disputes of course the appellee's thought that it is confronted with a monopolistic situation. This can be further demonstrated by the facts in this case.

It appears from the record that, at one time at least, the railroads here concerned had concluded that their cut-back rates had outlived their usefulness except for one road, the subsidiary of the Illinois Central, referred to in the Commission's report as the Y. & M. V. In the particular territory served by that road the continuance of the cut-back rates were essential to enable the road to meet water as well as truck competition, and it, therefore, stood out against the other roads, insisting upon maintaining its cut-back rates, which in turn compelled the other roads to do the same. This is clearly the opposite of a monopolistic situation and the shipper benefits "all down the line."

The above considerations bear especially on the system of cut-back rates as it stands. The Commission is without authority to prescribe other than reasonable rates, but, in the assumed section 15 (3) proceeding, it would be prescribing rates for the through movements. The decision in *Virginian Ry. v. United States*, 272 U. S. 658, shows that the rates over the existing routes, even though made



under stress of competitive conditions, may be properly considered in evidence but to be weighed, of course, together with other evidence, such as ton-mile and car-mile earnings volume of traffic and the like.

It is possible that a proceeding such as the above might result in the abandonment of cut-back rates by the railroads concerned, although, if confined to what now in practical effect exists, there would be no difference except that the appellee would not be bearing the sole expense. There would be, and is now a route situation favoring routes via the appellee, although not at all points and not necessarily unjustly so, particularly if the public interest in the route were shown. On the other hand, if it did prove necessary to extend to other routes a general proceeding might follow, although not necessarily a proceeding under section 15 (3).

**(3) What considerations of law, procedure, or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?**

If the Commission's findings of violations of the act are upheld, it is the view of counsel that the tariff would be required to be cancelled because of the policy of the act against departures from the published rates and because the plan of tariff publication used by appellee should not be permitted



even temporarily in view of the possible effect on the general railroad rate structure.

**(4) Have the courts power to require the Commission to take such procedure?**

It is counsel's view that, if the Court upholds the Commission's finding of violation of section 6 (7), the statute contemplates its cancellation. Further answering the question, while an order requiring such proceeding would not necessarily control administrative judgment in deciding the case, there is a complex and intricate rate situation existing which it is believed would involve administrative judgment in determining whether to institute an investigation upon the Commission's own motion.

**CONCLUSION**

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the bill for want of equity.

DANIEL W. KNOWLTON,  
*Chief Counsel,*  
*Interstate Commerce Commission.*



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**IN THE  
SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, A. D. 1942.**

**No. 628.**

**THE INTERSTATE COMMERCE COMMISSION, J. M. KURN  
and JOHN G. LONSDALE, Trustees, ST. LOUIS-SAN FRAN-  
CISCO RAILWAY COMPANY, et al.,**

**Appellants,**

**vs.**

**COLUMBUS AND GREENVILLE RAILWAY COMPANY,**

**Appellee.**

**Appeal from the District Court of the United States for the  
Northern District of Mississippi, Eastern Division.**

**BRIEF ON BEHALF OF RAIL APPELLANTS.**

**✓ ERLE J. ZOLL, JR.,  
✓ M. G. ROBERTS,  
✓ JOHN E. McCULLOUGH,  
Counsel for Rail Appellants.**



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THE INTERSTATE COMMERCE COMMISSION, J. M. KURN  
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Appellee.

---

Appeal from the District Court of the United States for the  
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**BRIEF ON BEHALF OF RAIL APPELLANTS.**

---

**OPINION BELOW.**

The report of the Interstate Commerce Commission, hereinafter referred to as the "Commission" (in *Cottonseed Allowances of Columbus & Greenville Railway Co.*, decided January 3, 1942), appears in 248 I. C. C. 441 (R. 5-13). The opinion of the specially constituted District Court, accompanied by its findings of fact and conclusions of law, is found in the record at pages 66 to 71, reported in 46 F. Supp. 204, titled *Columbus & Greenville Ry. Co. v. United States et al.*



## **JURISDICTION.**

The final decree of the District Court was entered on August 17, 1942 (R. 71-72). On November 19, 1942, the District Court extended the date within which said record shall be filed and docketed to January 5, 1943 (omitted in printing). The petition for appeal (R. 73) was filed and allowed on October 14, 1942 (R. 76). Probable jurisdiction was noted by this Court on February 1, 1943 (R. 80).

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, section 35, 31 Stat. 85; April 30, 1900, c. 339, section 86, 31 Stat. 158; March 3, 1909, c. 269, section 1, 35 Stat. 838; March 3, 1911, c. 231, sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938).



## QUESTIONS PRESENTED.

The Interstate Commerce Commission, in a report issued after an investigation instituted upon its own motion under Section 13 (2) of the Interstate Commerce Act as amended (*Cottonseed Allowances of Columbus & Greenville Railway Co.*, 248 I. C. C. 441, decided January 3, 1942) found that to the extent appellee's tariff I. C. C. No. 81 provided for a refund, or a cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it was unlawful, being in violation of Section 1 (6), Section 6 (4) and Section 6 (7) of the Interstate Commerce Act (R. 5-13).

An order was issued by the Commission on January 3, 1942, requiring appellee to cancel such unlawful provisions of said tariff on or before February 26, 1942 (R. 12). By order of the Commission, dated February 13, 1942, the effective date of its order of January 3, 1942, was modified to become effective April 28, 1942 (R. 13).

A complaint was filed by the Columbus and Greenville and in a decision, dated July 31, 1942, a statutory three-judge court of the Eastern Division of the Northern District of Mississippi held that the Commission's order of January 3, 1942, was invalid (R. 66-71), and on August 17, 1942, that Court entered a final decree for permanent injunction (R. 71-72).

The issue before the Court is as to the validity of the Commission's order of January 3, 1942. The fundamental questions are:

First. Was appellee accorded proper notice and a full opportunity to be heard?

Second. Was the order of the Interstate Commerce Commission reasonable and lawful?



Subordinate questions are as follows:

1. Whether the Court should substitute its judgment for the judgment of the Commission in declaring that the Columbus and Greenville Railway Company Freight Tariff No. 9-B, I. C. C. No. 81, does not conform to the standards laid down by the Interstate Commerce Act;

2. Whether the order of the Commission is supported by findings sufficient to disclose basic facts on which the Commission acted, and sufficient to disclose a correct application of statutory standards;

3. Whether the order and findings of the Commission are supported by the evidence, and;

4. Whether the Commission acted upon considerations authorized by law.

### **THE STATUTES INVOLVED.**

The provisions of Part I of the Interstate Commerce Act [Title 49, U. S. C., Sec. 1, par. (6); Sec. 2; Sec. 3, par. (1); Sec. 6, par. (1), par. (4) and par. (7); Sec. 13, par. (2), and Sec. 15, par. (13)], which govern the disposition of this case, are reproduced in full in Appendix A hereto. The pertinent provisions thereof may be summarized as follows:

Section 1 (6) of the Act provided that it is the duty of all common carriers to establish, observe, and enforce just and reasonable classifications of property for transportation, and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful.

Section 2 of the Act prohibits unjust discrimination and declares that rebates and all other devices resulting in unjust discrimination are unlawful.

Section 3 (1) of the Act forbids undue or unreasonable preference or advantage.

Section 6 (1) of the Act provides that every common carrier subject thereto shall file with the Commis-



sion, and print and keep open to public inspection, schedules showing all the rates for transportation not only between "different points on its own route," but also "between points on its own route and points on the route of any other carrier by railroad, \* \* \* when a through route and joint rate have been established."

Section 6 (4) of the Act requires concurrences of all participating carriers in joint tariffs.

Section 6 (7) of the Act provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, \* \* \* which are specified in the tariff filed and in effect at the time"; and, further, that no carrier shall "refund or remit in any manner or by any device any portion of the rates, \* \* \* so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 13 (2) of the Act authorizes the Interstate Commerce Commission to institute investigations on its own motion, and to issue orders in connection therewith.

Section 15 (13) of the Act provides that if the owner of property, transported under Part I of the Act, directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed with the Commission.



## STATEMENT OF THE CASE.

### I. Proceedings Before the Commission.

After report, order, and citation of the Commission in *Investigation and Suspension Docket No. 4599, Allowances on Cottonseed at C. & G. Ry. Points*, 238 I. C. C. 309, an investigation, hereinafter referred to as the "Investigation proceeding," was instituted, upon the Commission's own motion, into and concerning the lawfulness of the rates, charges, rules, regulations, and practices, published in Columbus & Greenville Railway Company, hereinafter referred to as "Columbus and Greenville," freight tariff No. 9-B, I. C. C. No. 81 (R. 5-13), providing refunds, sometimes called "cut-back," to shippers of outbound cottonseed products from manufacturing or mill points on its line in instances where the inbound shipments of cottonseed moved into the mill points over the lines of other rail carriers. Exceptions to the proposed report of the examiner in the Investigation proceeding were filed by (respondent) appellee herein; replies thereto were made by (interveners) appellants herein, and the issues were orally argued.

In the former proceeding, *Allowances on Cottonseed at Columbus & Greenville Railway Points*, supra, the Commission found unlawful (respondent's) appellee's freight tariff No. 9-C, I. C. C. No. 83, providing substantially the same refund or cut-back as published in appellee's tariff I. C. C. No. 81, which proposed to supersede and cancel the latter tariff (R. 56). The Investigation proceeding was instituted by the Commission on its own motion, to accord appellee a full hearing as to the lawfulness of its tariff I. C. C. No. 81.

It was stipulated before the Commission, by the parties, that the record and findings of fact in the prior proceeding, 238 I. C. C. 309, by reference, be made a part of the



record in the Investigation proceeding before the Commission to be supplemented by any documentary evidence and oral testimony that the parties desired to present, with the provision that the findings of fact in the prior report (238 I. C. C. 309) were not to be considered conclusive in the Investigation proceeding.

Appellee publishes in its tariff (Freight Tariff No. 9-B, I. C. C. No. 81) (R. 13-18), rates and rules governing transit privileges on cottonseed in carloads manufactured or processed at various points on its line. Under this tariff appellee applies the so-called "cut-back" rates on cottonseed originating at points *on and moving via lines other than* the Columbus and Greenville to mill points on its line when the manufactured products thereof are reshipped from the mill point via *its* lines.

This tariff provides that the Columbus and Greenville shall make a refund to the shipper of the manufactured product on presentation of freight bills *of other lines*, through claim channels, although the Columbus and Greenville did not participate in the inbound road haul to the mill point.

For example, J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, herein-after referred to as "Frisco," originates, at points on its line, shipments of cottonseed which are transported to Columbus, Mississippi, under normal rates, on which, upon reshipment via the Frisco of the products of the inbound seed, readjustment is made of the inbound rates paid on the seed to the basis of so-called "cut-back" rates published by the Frisco. The Columbus and Greenville, by the tariff in issue, has undertaken to refund to the shipper a part of the outbound rate it collects, based upon the inbound rates *paid to the Frisco* in consideration of the movement of the manufactured product over the Columbus and Greenville from Columbus.



On a shipment of cottonseed moving to a mill point over the Frisco, notwithstanding the fact that the inbound charges are collected by the Frisco for transportation services which it performs, and in which *the Columbus and Greenville* in *nowise* participates, that company is undertaking, through the tariff in issue, to authorize a refund predicated upon the charges collected by the Frisco. In effect, on the outbound movement of the manufactured products from the mill point, the Columbus and Greenville retains charges at less than the published rates. In other words, the tariff of the Columbus and Greenville undertakes to authorize the payment to the shippers of a refund to be made from the revenues earned in connection with the movement of the manufactured product outbound from Columbus, such refund, in effect, necessarily representing either a part of the transportation charges collected by the Frisco for services which it performed on the inbound movement of the cottonseed in which the Columbus and Greenville did not participate and consequently received no part of the revenue therefor, or a tantamount reduction in, or departure from, the applicable tariff rates on the manufactured products shipped via the Columbus and Greenville from the mill points.

Throughout this case appellee has attempted to place the burden of proof upon the rail appellants as to the lawfulness of rail appellants' cut-back rates. Clearly these rates are not in issue, as properly found by the Commission, 248 I. C. C. 441. Compare with *Lawrenceville Cooperage Co. et al. v. A. C. & Y. Ry. Co. et al.*, decided November 14, 1939, 235 I. C. C. 155.

Rail appellants contend that the tariff is unlawful and unreasonable in violation of Interstate Commerce Act in the respects as found by the Commission. They have also contended throughout the proceedings that the tariff in issue was also a violation of Section 2, Section 3 (1) and Section 15 of that Act.



It is not the purpose of appellants in this brief to discuss the lawfulness of the cut-back rates of the Illinois Central Railroad Company, hereinafter referred to as "Illinois Central" and the Frisco, *the only matter before the Court being the tariff of the Columbus and Greenville Railway* which attempts to make refunds to shippers at points on their line where the inbound shipment is *moved in by some other carrier.*

### **Pertinent Facts as Found by the Commission.**

The pertinent facts respecting the tariff in issue and the way in which it applies are well stated by the Commission as follows, 248 I. C. C. 441, l. c. 442-446:

"Excerpts from tariff I. C. C. No. 81, which purports to publish rates and rules governing transit privileges on cottonseed, in carloads, at Columbus, Greenville, Greenwood, Indianola, Moorhead, and West Point, Miss., are as follows:

"Item 5 (a) provides that the rates and rules published therein will apply on cottonseed, in carloads, from stations on the Columbus & Greenville Railway, or on cottonseed, in carloads, received from connecting lines at Columbus & Greenville Railway junction points with such lines to the named manufacturing or mill points for cracking, crushing, etc., and the subsequent shipment of the product, as described in Item 10, from such points via the Columbus & Greenville Railway.

"Item 5 (b) provides that the rates will also apply on cottonseed, in carloads, from stations on connecting lines and moving via such lines to the above-mentioned manufacturing or mill points on the Columbus & Greenville Railway, when the products of cottonseed as described in Item 10 are subsequently shipped in carloads, or less-than-carload quantities, from such manufacturing or mill points via the Columbus & Greenville Railway.

"Item 5 (c) provides that the rates published in the tariff may not be used in waybilling shipments, and



that all shipments must be waybilled at the full local or joint rates lawfully applicable to the manufacturing or mill points proper in effect on the date of shipment from the point of origin.

“Item 5 (d) provides that upon evidence of the shipment of the product in carloads, or less-than-carload quantities, over the Columbus & Greenville Railway at full published tariff rates applying from the manufacturing or mill point, the freight charges on cottonseed to the manufacturing or mill point will be reduced to the basis of rates shown in Item 40 through freight claim channels.

“Item 40 sets forth a mileage scale of rates designated to apply on cottonseed, carloads, minimum 30,000 pounds. The rates in this item are applied on the basis that for every 100 pounds of weight represented by inbound freight bills on cottonseed, surrendered for refund, there must be furnished evidence of shipment from the manufacturing or mill point of 93 pounds of cottonseed products. When inbound bills are surrendered at this ratio, the rates in Item 40 are applied to 93 per cent of the weight of the cottonseed.

“Item 25 provides that in the event changes are made in the rates and rules published in this tariff after the cottonseed is shipped from point of origin, the rates and rules in effect on date of the shipment from point of origin or mill point will apply.

“Briefly stated, the justification offered by respondent for its tariff I. C. C. No. 81 is that the tariff is primarily a local tariff publishing rates and rules governing transit privileges on cottonseed, in carloads, at mill points on its line; that the tariff applies locally from all points on its railroad to all mill points located thereon; that the transit privilege incorporated in the tariff by adjustment through claim channels, equalizes the net charge to the shipper for the total haul of the cottonseed and products thereof with charges resulting from the application of cut-back rates in tariffs of the connecting lines, including the protestants, at common mill points; that tariff I. C. C.



81 grants a privilege at the expense of respondent, and that the privilege is granted solely for the purpose of equalizing the net transportation cost to the shipper of the product from mill point to destination; that the tariff publishes no rates for application on the inbound movements; that the rates for the inbound movements of cottonseed are published in tariffs, local or joint, governing the movement to the mill point; likewise, the rates on cottonseed products from the mill point are published in tariffs, local or joint, governing the movement from the mill point; that the tariff here in issue is only a means to equalize the rates applicable to the movement of cottonseed to mill points therein named and the movement of the products manufactured therefrom to destinations over routes of respondent and its connecting lines with the rates over the routes of competing carriers; and that the resultant rates under the tariff here in issue on the movement of the seed to the mill, the movement of the product therefrom, or the aggregate of both, are identical with those available over competing carriers.

“The following excerpt from the record illustrates the application of the tariff:

“Take a shipment of cottonseed from Coahoma, Miss., a point on the Y. & M. V. Railroad, to Greenville, a distance of 87 miles. On the initial movement to Greenville the rate is 8.4 cents per 100 pounds. That rate is assessed and collected when the seed moves to Greenville. It is not the rate published in respondent's cut-back tariff, nor in the cut-back tariff of the Y. & M. V. Railroad. It is, however, the local rate of the Y. & M. V. Railroad as published in its tariff lawfully on file with the Interstate Commerce Commission. When the cottonseed oil is reshipped by the Columbus & Greenville Railway, a rate of 48 cents per 100 pounds, which is the full joint rate by way of the respondent and its connections from Greenville to Cincinnati, is assessed and collected and subsequently, and within 15 months from the date of issue of the bill of lading, the shipper files his claim for the privileges



granted under the tariff in question (I. C. C. No. 81). This respondent will refund the shipper to basis of rate set forth in its tariff for 87 miles, or 7 cents. \* \* \* The net cost would be, then, 7 cents to Greenville, plus 48 cents beyond, or a total of 55 cents per 100 pounds.

“ ‘Q. Mr. Hawkins, assuming that the product from the seed in the example given had moved from the mill point, Greenville, Miss., to Cincinnati, Ohio, by way of the Y. & M. V. Railroad, a connecting and competing carrier at that point with the C. & G., what would have been the net cost to the shipper for the through movement?

“ ‘A. The net cost would have been exactly the same. The mechanics of the tariff would have been the same. That is, that line would have assessed a rate of 8.4 cents on the initial movement; then upon reshipment that line would have assessed the same rate, that is, 48 cents; then subsequently, and within 15 months, it would have, upon presentation of claim, readjusted through claim channel the charges to the basis that would apply if the shipment moved over respondent's line. In other words, the net cost to the shipper is the same, however it moves.

“ ‘Q. Now, on your illustration there from Coahoma to Greenville \* \* \* what carrier would collect the local rate?

“ ‘A. The Y. & M. V. Railroad.

“ ‘Q. And if that shipment were moved from Greenville, or the products of the seed shipped from Greenville to Memphis via the Columbus & Greenville Railroad, how would the charges be refunded by the Columbus & Greenville?

“ ‘A. Just like they are by the Y. & M. V., upon evidence of reshipment and upon presentation of claim we would refund the shipper the difference between the 8.4-cent rate from Coahoma to Greenville, and the cut-back rate of 7 cents, or 1.4 cents, which would allow the Y. & M. V. its full local rate into Greenville and, additionally, will allow them full representation



and participation in the movement from Greenville to Memphis, the illustration you used.

“Q. Now, as I understand it, the Y. & M. V. are paid their full local. If the shipment moves from Greenville by the Y. & M. V. they reduce their local rate down to the cut-back, and their tariff similar to the C. & G. tariff, do they not?

“A. You can call it anything you want to. They refund the shipper the difference between 8.4 cents paid to the mill point and a fictional rate of 7 cents.

“Q. What do you mean by a fictional rate?

“A. I mean it has no application other than a basis for refunding the inbound rate to a lower basis.”

“Respondent is not a party to the inbound rates on cottonseed from points on the lines of its connecting rail carriers to the named mill points on its line, and no other carrier is a party to its tariff I. C. C. No. 81. The refunds, or cut-back, are exactly the same in amount as those of the other carriers serving the mill points. The difference between the practice of respondent and those of the other carriers is that it makes an allowance on seed that does not originate on its own line, and absorbs the allowances so made out of its proportion of the outbound rates to which it is a party. The purpose of making the refund is to enable it to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating lines hold themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move the outbound products over their lines. If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's tariff, as the inbound shipments move from origin points to the mills at the local rates, under separate bills of lading.

“The reason given by respondent for the opposition to its cut-back tariff by interveners is that it will interfere with their practice of recapturing the outbound traffic from the mill points by means of their cut-back rates on the inbound cottonseed. Respondent



contends that it has the right to offer the same concession as interveners, on the ground that the inbound carrier of the cottonseed to the mill point has no inherent or vested right to the outbound haul of the products manufactured from the seed, citing *Atehison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768. The court, among other things, said:

“ ‘This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. \* \* \* There is no rule of law or practice which gives a carrier the right to recapture traffic which it originated.’

“ ‘Intervenors emphasize a distinction in that the tariff of respondent attempts to name rates for account of their lines without their concurrence, whereas their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point. The legality of intervenors’ tariffs is not in issue; however, this is an important difference between the application of the respective tariffs. On the question of equality of the rates raised in the former proceeding, division 3 said:

“ ‘Instead of placing itself on an equal basis with its competitors, respondent’s present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier.’

“ ‘Section 6 of the Interstate Commerce Act provides that every common carrier shall publish tariffs showing the charges for transportation between different points on its own line and between points on its own line and points on the line of any other carrier. Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent’s tariff is published clearly does not conform to the requirements



of section 6 (1) and (4) of the act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the act.

“Respondent provides the same cut-back for cottonseed originating on its line which it brings into the mill points as do the other carriers serving those points. No objection is made to that practice. Respondent originates some 15 or 20 per cent of the cottonseed milled at the junction points. Some 50 per cent of the inbound seed is brought into the mill points by truck. This leaves some 30 or 35 per cent of the total traffic possibly subject to respondent's cut-back on traffic originating on other lines. No provision is made for refund to shippers on that portion of the traffic brought into the mill points by truck. Upon oral argument, it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute.”

## **II. Proceedings Before the Three-Judge Court.**

The appellee filed its complaint in the District Court (R. 1-52) to enjoin and set aside the operation and effect of the order of the Commission in Docket No. 28,590, entitled “*Cottonseed Allowances of Columbus and Greenville Railway Company*,” issued January 3, 1942, as amended, to become effective April 28, 1942 (R. 5-13).

The United States of America and the Interstate Commerce Commission were named as defendants. J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor, and the Illinois Central Railroad Company, which were interveners in the proceeding before the Commission, were also named as parties defendant (R. 1).



On April 3, 1942, an order was issued organizing a three-judge court and fixing April 24, 1942, as the date for the hearing on the issuance of an interlocutory injunction (omitted in printing).

An answer, dated April 17, 1942, to the complaint was filed on behalf of the Interstate Commerce Commission (R. 53-54).

An answer, dated April 21, 1942, was filed on behalf of the United States of America (omitted in printing).

A joint answer, dated April 21, 1942, was filed on behalf of the Illinois Central Railroad Company and J. M. Kurn and John G. Lonsdale, Trustees, St. Louis-San Francisco Railway Company, Debtor (R. 54-55).

On April 24, 1942, prior to the oral argument, the Court authorized the appellee to amend its original complaint and the railway appellants to amend their answer (omitted in printing).

The various parties filed their memorandum briefs, and the case was orally argued before the Court on April 24, 1942.

On April 24, 1942, an order directing the issuance of an interlocutory injunction was issued (omitted in printing).

On July 31, 1942, the three-judge Court rendered its opinion, reported in 46 F. Supp. 204, finding that the appellee was entitled to the relief sought (R. 66-71).

On motion of appellants, the Court, in an order dated November 19, 1942, extended the time in which to file and docket this appeal to this Court to January 5, 1943. From that order a direct appeal was taken to this Court.



### **SPECIFICATION OF ERRORS TO BE URGED.**

The Three-Judge Court erred—

- (1) In finding that appellee, by publishing the condemned tariff, was not seeking any advantage, but was only seeking equality;
- (2) In finding that without this tariff appellee's right to compete for this outbound freight is destroyed;
- (3) In holding that appellants' tariffs are very material to a correct solution of the validity of the appellee's tariff;
- (4) In holding that appellee's tariff does not affect the outbound rate of connecting carriers;
- (5) In finding that appellee's tariff is essentially the same as those of the appellants' lines;
- (6) In holding that the outbound freight rate is in no way affected by the terms of appellee's tariff;
- (7) In holding that appellee is entitled to the relief sought;
- (8) In sustaining the tariff in question, and in substituting its judgment for that of the Interstate Commerce Commission on administrative matters which have been placed by Congress within the jurisdiction of the Interstate Commerce Commission;
- (9) In failing to sustain the order of the Interstate Commerce Commission;
- (10) In failing to dismiss the suit for want of equity;
- (11) In entering the interlocutory order of April 24, 1942, temporarily restraining the enforcement of the order of the Commission, and
- (12) In making and entering the final decree of August 17, 1942, permanently enjoining, annulling and setting aside the order of the Interstate Commerce Commission.



## **SUMMARY OF ARGUMENT.**

Appellants contend that the tariff of the Columbus and Greenville, I. C. C. No. 81, is unlawful and in violation of Sections 1 (6), 2, 3, 6 (4), 6 (7), and 15 (13) of the Interstate Commerce Act in that it purports to name rates on cottonseed to various mill points on its line in which the Columbus and Greenville do not participate in the transportation of the traffic, and that it purports to name joint rates from points on its connecting rail lines to mill points on its line moving jointly via such connections and the Columbus and Greenville without procuring the necessary concurrence of such connecting rail lines; they are not named as participating carriers in the tariff here in issue. While the tariff by its title page would indicate that it names transit privileges at mill points on the Columbus and Greenville, a matter of sole concern to the Columbus and Greenville, the tariff in substance clearly purports to name rates on carload shipments of cottonseed.

Appellants contend that the Commission, in holding that the tariff in issue was published in a form and manner which was not in conformance with the standards set up by Section 6 (1) and (4) of the Act, and that its operation resulted in a practice which was unreasonable and hence unlawful under the provisions of Section 1 (6) of the Act, was exercising its judgment and discretion on a fully administrative matter entrusted by Congress to the Commission alone. Appellants urge that the three-judge court erred in substituting its judgment for that of the Commission on these technical and administrative questions.



## ARGUMENT.

The issue in this proceeding involves the validity of an order of the Interstate Commerce Commission (R. 12-13), whereby the appellee, the Columbus and Greenville Railway, was ordered to cancel its Tariff I. C. C. No. 81. The Interstate Commerce Commission found that appellee's Tariff I. C. C. No. 81 provided for a refund or cut-back to the shipper on traffic originated and hauled to the mill points by other rail carriers in violation of Section 1 (6), Section 6 (4) and Section 6 (7) of the Interstate Commerce Act.

The tariff, while by its title page indicates it publishes transit privileges on cottonseed in carload quantities, in fact, purports to publish rates on cottonseed from points on lines *other* than the Columbus and Greenville to mill points on the Columbus and Greenville, but in which the Columbus and Greenville does not participate. Also, it purports to publish rates on cottonseed from points on connecting lines of the Columbus and Greenville moving jointly via such lines and the Columbus and Greenville, although the connecting lines of the Columbus and Greenville are not named as participating carriers and do not concur in the tariff.

The Columbus and Greenville Railway issued its Tariff I. C. C. No. 81 for the purpose of placing it in a position to participate in the movement from the manufacturing or mill points of products obtained from cottonseed originating on other rail lines, *and moving via such other rail lines to the manufacturing or mill points.*

It will be noted by referring to Item 35 of the tariff here in issue that *the basis for the refund referred to therein is the difference between the charges on the inbound movement of the cottonseed and the rates published in the Columbus and Greenville Tariff I. C. C. No. 81.*



In no section of the tariff is any reference made to any readjustment of the charges on the shipments of the product from the manufacturing or mill point. The tariff clearly purports to name rates on cottonseed, not only from points on the Columbus and Greenville, but also *from origin points on connecting lines* when shipments move via other lines and the Columbus and Greenville, and from origin points on other lines when shipments move from such points to the manufacturing or mill point *via such lines only* (the Columbus and Greenville not participating in such movement). To the extent that the tariff purports to name rates on shipments of cottonseed originating on and moving via other lines, or, from connections of the Columbus and Greenville in connection with the Columbus and Greenville to the mill points it is of no force and effect. No carrier other than the Columbus and Greenville is shown as a concurring or participating carrier therein.

In *Brenner Lumber Co. v. Director General*, 66 L. C. C. 595, the Commission considered the legality of a tariff of the Texas & Pacific Railway Company purporting to designate joint rates to be applied on lumber from a transit point to destination.

The shipments involved consisted of lumber manufactured at Alexandria, Louisiana, from logs shipped over the Texas & Pacific from points in Louisiana. The lumber also moved from Alexandria over the Texas & Pacific. The question before the Commission was whether under the provisions of the respective tariffs naming the log rates to, and the lumber rates from, Alexandria, the rates applicable were those in effect when the shipments of logs originated, or the higher rates in effect when the lumber was forwarded from Alexandria. Charges were collected on the latter basis. The local tariff of the Texas & Pacific, under which the logs moved to Alexandria, contained, among others, the following provision:



"The rate to apply on the products moving out of the transit point under this Tariff will be that in effect from the transit point to destination on date of shipment from point of origin of the **Rough Material**."

The transcontinental tariffs under which the shipments of lumber moved from Alexandria to destination contained a restriction with respect to the application of transit privileges to the effect that *transit would be permitted only when specific authority therefor was published in those tariffs* immediately in connection with the rates on the commodity. The Commission said, l. c. 597:

"The essential facts are that the shipments of logs were hauled to Alexandria and there manufactured into lumber at rates and under rules published in the Texas & Pacific's local tariff, to which other lines were not parties; that the lumber rates outbound were published in separate tariffs which contained no reference to the tariff of the Texas & Pacific; and that the shipments did not assume the character of lumber shipments, and did not become subject to the transcontinental tariffs, until they were delivered to the carriers at Alexandria for further transportation. It is clear that the transit provisions of the transcontinental tariffs, which named rates on lumber from Alexandria to the destination here considered, and which did not sanction the Texas & Pacific's transit rule, referred only to transit on the commodity transported and not to the prior transit on the logs at Alexandria. It follows that the transcontinental tariffs were neither governed by I. C. C. 2014 nor had the effect of nullifying the unrestricted provisions of that tariff wherein shippers were notified that when the lumber manufactured from logs transported thereunder to Alexandria moved via the Texas & Pacific to 'interstate destinations to which through rates are published in tariffs on file with the Interstate Commerce Commission,' the rates to apply would be those in effect from Alexandria to destination 'on date of



shipment from point of origin of the rough material.' *Although the rates charged were applicable, the effect of item 43½ of I. C. C. 2014 was that the Texas & Pacific published by reference, without the concurrence of its connections, the joint rates contained in the transcontinental tariffs in effect when the shipments moved. Such a publication of rates was in direct contravention of our rules made under authority of Section 6 of the act. Complainant was justified in relying upon the lower basis of rates thus offered and thereby suffered damages for which we may award reparation."*

The principle announced by the Commission in the above decision to the effect that the Texas & Pacific Railway Company tariff in publishing rates without the concurrence of its connections was unlawful is controlling in the instant case, and, therefore, the tariff of the Columbus and Greenville must be found to be unlawful as found by the Commission. *First*, it purports to name joint rates on cottonseed from stations on connecting railway lines of the Columbus and Greenville to the mill or manufacturing points on the Columbus and Greenville without the concurrence of its connecting railway lines in violation of Section 6 (4) of the Interstate Commerce Act; *Second*, it purports to name rates on cottonseed in the movement of which the Columbus and Greenville does not participate from points of origin to the mill or manufacturing points, which is, in effect, a mere device to accord a rebate to shippers, in violation of Section 1 (6) of the Interstate Commerce Act.

The distinction between the application of the tariffs of appellant railroads and the tariff of the Columbus and Greenville is that the latter attempts to name rates for account of other lines without their concurrence, whereas, tariffs of appellant railroads apply solely on shipments of cottonseed which they transport via their respective lines to the mill or manufacturing points.



While the legality of the tariffs of appellant railroads is not an issue in this proceeding, it is necessary to bear this difference between the applications of the respective tariffs in mind, as appellee, to a great extent, relies upon justification of its tariff as being merely a means of meeting competition afforded by the rates available on shipments of cottonseed under the tariffs of appellants. However, as pointed out by the Commission in 238 I. C. C. 309, l. c. 313:

“Instead of placing itself on an equal basis with its competitors, respondent (appellee’s) herein *present effective* and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier.” (Italics ours.)

Appellee makes no contention that the shippers, in connection with the movement of cottonseed to the mill or manufacturing point or in connection with the movement of products therefrom, perform any transportation service for account of the Columbus and Greenville which the Columbus and Greenville is required to perform. There is no dispute as to the fact that the shippers do not perform any service of this character; this being true, the refunds which the Columbus and Greenville purports to accord shippers of cottonseed products from the manufacturing or mill points cannot be clothed with legality as “allowances,” as such refunds, under the circumstances, would be clearly in violation of Section 15 (13) of the Act. As pointed out by the Interstate Commerce Commission in its report in the prior proceeding, 238 I. C. C. 309, l. c. 315:

“Refunds contemplated by the suspended schedules, although denominated allowances, are not allowances within the meaning of the term ‘allowance,’ as used in Section 15 (13) of the Act, because the shippers or owners of the traffic do not perform any part of the transportation service.”



The fact that these refunds are made pursuant to a tariff on file with the Interstate Commerce Commission does not change the situation. As was said by the Commission in *Rates for Transportation of Anthracite Coal*, 35 I. C. C. 220, l. c. 243:

"The term 'lateral allowance' in the carrier's tariffs was and is misleading, for the reason that the allowances *were not paid for the purpose of compensating the shipper for any service or for the use of any instrumentality connected with the transportation of its shipments, as defined in section 15 of the act to regulate commerce. Under these circumstances, even if the amounts of these allowances were published, their payment is the payment of a rebate, and hence unlawful.*" (Italics ours.)

In *Merchants Warehouse Co. v. United States et al.*, 283 U. S. 501, it appeared that payments were made by carriers to a warehouse for the service of assembling and loading package freight for shipment in individual carload shipments and of unloading and distributing like incoming consignments. In commenting upon the practice the Court, inter alia, said, l. c. 510-511:

"Such allowances are forbidden, even though paid to appellants and their *competitors alike*, since, as to both, they would be departures from carload rates of the published tariffs of the carriers and amount to rebates forbidden by Sections 2 and 3 of the Interstate Commerce Act. \* \* \*" (Italics ours.)

In *Lehigh Valley Railroad Company v. United States*, 243 U. S. 444, the Court said:

"If the shipper were the owner an allowance to him of a percentage upon the freight as an inducement to ship by that line, *however honest and however justifiable on commercial principles, would be contrary to the Act to Regulate Commerce as it now stands*" (l. c. 444-445).



*"Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words" (l. c. 446).*

In *Drayage Absorptions by Southwest Missouri Railroad Company*, 113 I. C. C. 179, the Commission's report discloses that pursuant to the tariff under consideration in that proceeding, the railroad company, out of its published tariff rate for rail transportation, made to certain shippers at certain mines, either directly or through the medium of payments to teamsters employed by and under the direction and control of those shippers, specified rebates varying in amount in inverse ratio with the accessibility of such mines to that carrier's rails. The practice was condemned as being unlawful.

Rail appellants contend that the decision of this Court in *Atchison, Topeka & Santa Fe Railway Company et al. v. United States et al.*, 279 U. S. 768, cited to the three-judge court by appellee, is not applicable to the facts of the present case. The Santa Fe, after the grain moved from the country point of origin to the mill point and freight charges were paid, attempted to collect, in the event the commodity was shipped out by the Kansas City Southern or other rail carrier, an additional 4 cents per hundred pounds on the inbound rate. The Columbus and Greenville in the instant case has the same rate outbound from the common mill points as the Frisco and the Illinois Central. *The outbound rates to the interstate destinations are published in joint through tariffs in which the carriers concur.* All are on the same basis. The Commission was correct in finding that if the Columbus and Greenville were allowed to make this refund they would be in a more advantageous position as to the outbound rate than the protestant carriers.

Some conclusion should first be reached as to the meaning of the term "refund." The word "refund" connotes



that something has been paid by the shipper to the carrier, but in the application of the tariff in issue the Columbus and Greenville is attempting to refund to the shipper part of the charges for transportation services performed by and paid to other carriers on the inbound movement of the seed.

Appellants do not take issue with the finding of the Commission that transit is a privilege local to carriers publishing such tariff, as decided by this Court in *Central Railroad Company of New Jersey et al. v. United States and Interstate Commerce Commission*, 257 U. S. 247, but do respectfully submit that this decision cited by appellee has no bearing on the issues here presented. The title page of the tariff here in issue would indicate that it provides transit privileges, a matter of sole concern to the Columbus and Greenville. The fact is that the tariff purports to name rates on cottonseed from stations on other lines to mill points on the Columbus and Greenville which moves solely via the lines of such other carriers.

Throughout this entire case rail appellants have contended that the tariff in controversy of the Columbus and Greenville is, as a matter of fact, a rebate or an attempt to purchase traffic for its line. On page 5 of appellee's petition for reargument before the Commission, appellee frankly admits that the "privilege it extends \* \* \* and the practice is entirely at its expense." In the same paragraph it is alleged that the schedule in issue equalizes conditions, but this Court in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, l. c. 46, stated:

"The law does not attempt to equalize fortune, opportunities or abilities."

As previously explained in this brief, the Columbus and Greenville tariff provides that even though the Columbus



and Greenville has not participated in the inbound haul of the cottonseed to the mill point, nevertheless the Columbus and Greenville will make a refund to the shipper if he ships the manufactured product outbound from the mill point over the Columbus and Greenville. These outbound hauls are to interstate destinations via a number of carriers—the Columbus and Greenville being the initial carrier—participating in the haul and joining in the joint rate applicable to that outbound haul. The refunds made by the Columbus and Greenville are absorbed by it out of its proportion of those outbound joint rates.

After describing the nature of the Columbus and Greenville tariff, the Commission called attention to the provisions of Section 6 of the Act. Section 6 (1) requires that every carrier publish tariffs showing the charges for transportation between points on its own line and between points on its line and points on the line of any other carrier. Section 6 (4) requires the concurrence of all carriers parties to a joint rate applying in connection with their respective lines.

In its report the Commission observed that the effect of the Columbus and Greenville tariff is to make available to the outbound shipper a rate lower than the joint rate which the Columbus and Greenville and its connections have published and which is on file with the Commission. The Columbus and Greenville, by means of this tariff which it alone has published and to which no other carrier is a party, is actually reducing the joint outbound rate without the concurrence of the other carriers parties to that joint rate.

After making those observations and after calling attention to the requirements of Section 6 of the Act, the Commission concluded that:

“The form and manner in which respondent’s [appellee’s] tariff is published clearly does not con-



form to the requirements of section 6 (1) and (4) of the act."

The Commission also held that:

"The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (5) of the act."

Section 1 (6) of the Act requires carriers to establish and observe "just and reasonable regulations and practices affecting classification, rates, or tariffs \* \* \*," and provides that "every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

It is the position of these appellants that

(1) the Commission, in finding that the form and manner in which the Columbus and Greenville tariff is published does not conform to the requirements of the Act, and in finding that the refunding device set up by that tariff is an unreasonable and unlawful practice, was exercising its judgment on purely administrative matters which have been placed by Congress within the exclusive jurisdiction of the Commission; and

(2) the three-judge court, in sustaining the Columbus and Greenville tariff erred in substituting its judgment for that of the Commission on such administrative questions.

Section 6 of the Act requires that tariffs and concurrences be filed with the Commission. The Commission held the form of the Columbus and Greenville tariff and its manner of being filed and published did not conform to the requirements of that section. This Court has held on prior occasions that it is solely up to the Commission to determine whether or not tariffs are properly published and filed with it.



In *Norfolk Southern R. R. Co. v. Chatman*, 244 U. S. 276, the form in which charges were set up in a tariff of the Pennsylvania Railroad Company was objected to, but this Court declined to consider the objection, saying, l. c. 284:

“The objection that the published tariff of the Pennsylvania Company did not specify how much of the stipulated payment by the plaintiff should be treated as payment for the transportation of the stock and how much for the transportation of the caretaker, and that the payment for the carriage of the plaintiff was not separately stated in a passenger tariff, cannot be considered in this case for the reason that the *Act to Regulate Commerce* (Sec. 6, as amended June 29, 1906, June 18, 1910, and August 24, 1912) *commits to the Interstate Commerce Commission the determining and prescribing of the form in which tariff schedules shall be prepared and arranged, and this is an obviously administrative function with which the courts will not interfere in advance of a prior application to the Interstate Commerce Commission. Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 232 U. S. 199, 221; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138.” (Italics ours.)

Another decision of this court supporting appellants' contention is *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 232 U. S. 199, where this Court said, l. c. 220-221:

“What is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less-than-carload lots. It may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. *It may pre-*



*scribe the form in which schedules shall be prepared and arranged (§ 6) and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void."* (Italics ours.)

These two decisions by this Court, we submit, reveal the error committed by the lower court. The Commission has in two proceedings, after full hearings and mature consideration, found that the Columbus and Greenville tariff is not published in the *form or manner* which, in its opinion, is called for by section 6 (1) and (4) of the Act. What is a proper *form and manner* is for the Commission alone to say. Yet the effect of the lower court's decision is to hold that the Columbus and Greenville tariff is published and filed in a proper form and manner under the Act. The three-judge court has therefore invaded the domain which Congress has committed exclusively to the Interstate Commerce Commission.

The second ground on which the Commission found the Columbus and Greenville tariff unlawful was:

"The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent [appellee] is a practice made unlawful by section 1 (6) of the Act."



As explained before, the Commission, in its report, observed how the Columbus and Greenville, by means of this tariff, makes available to shippers a rate outbound from the transit point lower than the joint outbound rate actually published and filed by the Columbus and Greenville and its connections. The Commission called attention to the fact that this reduction of the joint rate was effected by the Columbus and Greenville without the concurrences of the Columbus and Greenville's connections, parties to the joint rate. This the Commission held was an unlawful practice under section 1 (6) of the Act.

Here, again, the Commission's holding was the result of its exercise of technical and informed judgment on an administrative question. Whether the making of refunds to shippers under those conditions was a reasonable or unreasonable practice is for the Commission and not a court to say. This Court has so held.

In *Great Northern Ry. Co., et al. v. Merchants Elevator Co.*, 259 U. S. 285, this Court said, *l. c.* 291:

*"To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."* (Italics ours.)



The effect of the three-judge court's decision in the instant case is to hold the practice of making refunds under the Columbus and Greenville tariff and under the conditions making that tariff operative, a reasonable and lawful one despite the Commission's holding to the contrary. The Commission found that the making of refunds in the form and manner employed by the appellee's tariff is an unreasonable and unlawful practice. This Court has said in *Virginia Railway Co. v. United States*, 272 U. S. 658, 1 c. 665-666:

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541. It was shown that a huge coal traffic moves from this territory, under like operating conditions, at the blanket rates which were voluntarily established by the other carriers to serve mines similarly located. This fact, and much else in the voluminous record, afford substantive evidence to support the finding that the existing rates are unreasonable; and that those which the order directs are reasonable." (Italics ours.)

The following from *Board of Railroad Commissioners v. Great Northern Ry. Co.*, 281 U. S. 412, delineates the function and action of the Commission in the instant case, 1 c. 421-422:

"The inquiry would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound adminis-



trative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discrimination must depend."

Appellants submit therefore that the three-judge court erred in finding the Commission's order invalid and in substituting its judgment for the judgment of the Commission on whether the appellee's tariff is filed in a proper form and manner and whether the making of the refunds authorized by the tariff constitutes a reasonable or unreasonable practice under the Interstate Commerce Act.

### CONCLUSION.

Briefly stated and boiled down, this tariff provides, *inter alia*, that the Columbus and Greenville will grant a refund to the shippers of cottonseed products from the mill or manufacturing points when the raw products, the cottonseed, is shipped to the mill or manufacturing points *exclusively over another railroad*, the sole consideration therefor being the movement outbound of the cottonseed products via the Columbus and Greenville, without any transportation service being performed by the Columbus and Greenville on the *inbound shipment*. The tariff also provides that the Columbus and Greenville will grant a refund to the shippers of cottonseed products from the mill or manufacturing points when the raw products, the cottonseed, is shipped to the mill or manufacturing points via other carriers and the Columbus and Greenville jointly, although such other carriers do not concur in nor are they named participating carriers therein.



The Columbus and Greenville in its tariff (Item 35 in Freight Tariff No. 9-B, I. C. C. 81) speaks of "claims for refund of charges on the inbound movement." It cannot possibly make a "refund" of charges on the inbound movement when it did not receive any part of those charges in the first place, as in the case of inbound seed movements via lines other than the Columbus and Greenville, nor can it refund a part of the inbound charges on shipments of seed moving to the mill points via its line originating on and moving jointly via other lines and the Columbus and Greenville, in effect reducing the applicable tariff charges on such shipments without the concurrence of its connections. They are not named as concurring carriers in the tariff in issue. The word "refund" in the tariff is, therefore, a *misnomer*. It is nothing more or less than an *allowance*, as the Columbus and Greenville so termed it in its Tariff I. C. C. No. 83, found unlawful in 238 I. C. C. 309. Such a payment to a shipper, whether it be termed a refund, an allowance, or any other similar term, constitutes a violation of Section 1 (6), Section 6 (4), Section 6 (7) and Section 15 (13) of the Act.

It is further submitted by these rail appellants that the tariff in question is unlawful and unreasonable, and that the order of the Interstate Commerce Commission instituting an investigation of this tariff was fair, just and reasonable, and that the Commission entered its further order requiring its cancellation after a full hearing upon proper evidence submitted before it; that there is no evidence before the Court to show there is any deprivation of appellee's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.



Wherefore, appellants respectfully submit that the decree of the three-judge court should be reversed and the case remanded with directions to dissolve the injunction.

Respectfully submitted,

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## **APPENDIX A.**

### **STATUTES CITED.**

#### **Part I of the Interstate Commerce Act.**

##### **Section 1 (6). (U. S. Code, Title 49, Sec. 1, Par. 6.)**

"It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

##### **Section 2. (U. S. Code, Title 49, Sec. 2.)**

"That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges,



demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 (1) (U. S. Code, Title 49, Sec. 3, Par. (1)).

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic or any other carrier of whatever description."

Section 6 (1) (U. S. Code, Title 49, Sec. 6, Par. 1).

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the



separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Section 6 (4) (U. S. Code, Title 49, Sec. 6, Par. 4).

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

Section 6 (7) (U. S. Code, Title 49, Sec. 6, Par. 7).

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the



rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 13 (2) (U. S. Code, Title 49, Sec. 13, Par. 2).

"Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Represent-



tatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide."

Section 15 (13) (U. S. Code, Title 49, Sec. 15, Par. 13).

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

### **Certificate of Service.**

I hereby certify that I have this day served the aforesaid brief on behalf of rail appellants upon all parties of record in this case by mailing a copy thereof properly addressed to each other party of record.

John E. McCullough,  
Of Counsel for Rail Appellants.

Dated at St. Louis, Missouri, this 11th day of March,  
1943.



**FILE COPY**

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MAY 21 1943

CHARLES F. EMMETT

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1942

No. 628

THE INTERSTATE COMMERCE COMMISSION, J. M. KURN and JOHN G. LONSDALE, Trustees, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, and ILLINOIS CENTRAL RAILROAD COMPANY,

*Appellants,*

vs.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,  
*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI,  
EASTERN DIVISION.

ON REARGUMENT.

BRIEF ON BEHALF OF J. M. KURN and JOHN G. LONSDALE, Trustees, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, and ILLINOIS CENTRAL RAILROAD COMPANY, RAIL APPELLANTS.

JOHN E. McCULLOUGH,  
M. G. ROBERTS,  
ERLE J. ZOLL, JR.,  
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*Counsel for Rail Appellants.*



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No. 628

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BRIEF ON BEHALF OF J. M. KURN and JOHN G. LONSDALE, Trustees, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, and ILLINOIS CENTRAL RAILROAD COMPANY, RAIL APPELLANTS.

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**STATEMENT.**

This case was argued on April 7 and 8, 1943. The Court on April 19, 1943 ordered the case restored to the docket for reargument, and requested that counsel direct



their attention particularly to certain questions. We shall deal with these questions *seriatum*, and shall cite in the course of our discussion of these questions the cases to which we referred in the reargument on May 13, 1943. This brief is filed pursuant to permission given by the Court at the reargument.

A statement of the case will be found in the brief filed on behalf of these rail appellants prior to the date of the first argument. For the Court's convenience we have again set forth in Appendix A the pertinent provisions of the Interstate Commerce Act.

- (1) Is Freight Tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

Freight Tariff No. 81 clearly violates Paragraphs (4) and (7) of Section 6 of the Interstate Commerce Act. It violates other sections of that Act, but the violations of these two paragraphs are so clear that it is not necessary to consider *in extenso* the violations of other portions of the Act. We first direct the Court's attention to the violation of Paragraph (4) of Section 6.

The fundamental vice, the underlying illegality in Tariff No. 81 lies in the attempt of the Columbus and Greenville to establish what are in substance and in effect joint rates, not in accordance with the plain requirements of Paragraph (4) of Section 6, but by the absorption of the line-haul rates of connecting carriers not parties to the tariff.

Paragraph (4) of Section 6 provides that the names of the several carriers which are parties to any joint tariffs shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission. The Columbus and Greenville has



made no attempt to comply with this mandate of the statute.

A reference to the record (R. 13-18) will show that Tariff No. 81 is not a joint tariff to which connecting railroads are parties, but on the other hand is a local tariff of the Columbus and Greenville alone. The Columbus and Greenville alone has published and filed the tariff. The tariff, nevertheless, by its plain terms undertakes to establish rates on cottonseed from stations on connecting railroads applying via those connecting railroads to designated mill points. That this is so is shown by Item 5(b) of the tariff, which specifically provides (R. 14) :

"(b) The rates and rules published in this tariff will also apply on Cottonseed, in carloads, from stations on connecting lines, via such lines, to the following manufacturing or mill points on the Columbus and Greenville Railway: Columbus, Miss.; Greenville, Miss.; Greenwood, Miss.; Moorhead, Miss.; West Point, Miss., when the Product, as described in Item 10, is subsequently shipped in carloads, or less than carload quantities, from such points via the Columbus and Greenville Railway."

Mr. Z. P. Hawkins, Traffic Manager of the Columbus and Greenville, in his testimony before the Interstate Commerce Commission in *Docket No. 28590, Cottonseed Allowances of Columbus and Greenville Ry. Co.*, said in reference to Freight Tariff No. 81 (Tr. 6) :

"\* \* \* This tariff applies locally from all points on this carrier to all of its mill points. *Additionally it applies from stations on connecting lines via such lines to the same mill points*, where the products of the manufactured cottonseed are reshipped by respondent's lines at the full published tariff rates applying from such point to final destination, which is the identical condition attached to the movement of seed originating on respondent's line." (Italics ours.)



Here is notice to the world by the Columbus and Greenville that it is establishing rates from stations on connecting railroads to these mill points, although, as stated, these connecting railroads are not parties to the tariff. Their names have not been specified therein, and there is no showing that they ever filed any evidence of concurrences in this tariff.

Freight Tariff No. 81 actually contains directions respecting the application of rates which, if they are to be applied at all, must be applied not by the Columbus and Greenville but by the connecting carriers: the St. Louis-San Francisco and the Illinois Central. The form in which this tariff is cast plainly reflects the effort of the Columbus and Greenville to apply the so-called rates named in the tariff from stations on railroads not parties to the tariff.

Paragraph (c) of Item 5 of this tariff, reads as follows (R. 14) :

"The rates published in this tariff, must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates, lawfully applicable to manufacturing or mill point proper, in effect on date of shipment from point of origin."

The Columbus and Greenville has nothing whatever to do with the waybilling of the shipments from stations on connecting lines to the mill points named in Item 5 of the tariff. The shipments do not move via the line of the Columbus and Greenville to those points. The statement in Paragraph (c) of Item 5, that all shipments must be waybilled at full local or joint rates, is addressed not to the Columbus and Greenville but to railroads such as the St. Louis-San Francisco and the Illinois Central which are not parties to this tariff. These railroads, as shown by their own tariffs that are a part of this record (St. Louis-San Francisco Freight Tariff 5162-T, R. 19;



Illinois Central Tariff Supplement No. 12 to 2912-Q, R. 26), publish rates that apply to the movement of cottonseed from points on their lines to the mill points that they reach.

The Columbus and Greenville has sought to establish joint rates not in the manner plainly and imperatively required by the language of the statute itself (Paragraph (4) of Section 6), but by rules in its tariff that provide for the absorption of the line-haul rates of connecting carriers, not parties to its tariff. Paragraph (d) of Item 5 of Tariff No. 81, sets forth the manner in which the Columbus and Greenville will absorb a portion of the line-haul rates of connecting carriers, which line-haul rates the Columbus and Greenville did not collect and never received. The application of Tariff No. 81 to a particular shipment is described by the Commission in its report in *Docket No. 28590, Cottonseed Allowances of Columbus and Greenville Railway* (R. 8).

This is not the first time that a railroad company has taken the law into its hands, and has sought through this same device to avoid and evade the mandatory requirements of Paragraph (4) of Section 6. We list in a footnote \* the cases in which the Interstate Commerce Commission has considered this same question, and in which the Commission has uniformly reached the same conclusion: the absorption by one carrier of the line-haul rates or charges of another as a means of establishing through rates is unlawful (*Brick Rates From Danville*, 63 I. C. C. 277, p. 278).

The first of these decisions (*New York, New Haven & Hartford R. R. Co. v. Platt and Perry*, 7 I. C. C. 323) was

\* *New York, New Haven & Hartford R. R. Co. v. Platt and Perry, Receivers of New York & New England R. R.*, 7 I. C. C. 323; *Coal Rates on Stony Fork Branch*, 26 I. C. C. 168; *C. M. & St. P. Ry. Co. v. G. N. Ry. Co.*, 49 I. C. C. 302; *Brick Rates from Danville*, 63 I. C. C. 277; *Southern Class Rate Investigation*, 100 I. C. C. 513, p. 681; *Consolidated Southwestern Cases*, 123 I. C. C. 203, pp. 379-380 and 211 I. C. C. 601, pp. 622, 623; *Paraffine Cos. v. D. & R. G. W. R. R. Co.*, 222 I. C. C. 303.



decided on June 26, 1897. It appears from the Commission's decision that the New York & New England Railroad had attempted to establish rates to points on the New York, New Haven & Hartford Railroad by adding to rates that were somewhat less than the local rates of the New York & New England Railroad, the local rates of the New Haven. The total rate thus arrived at was published by the New York & New England Railroad in its own tariff. The Commission said in part (p. 329) :

"The Act to Regulate Commerce mentions two kinds or classes of rates, namely, rates established by a single carrier 'upon its route,' and joint rates 'over continuous lines or routes operated by more than one carrier.' Is the tariff in question a tariff of joint rates? The 6th section of the Act contains this provision :

'In cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall \* \* \* be filed with said Commission.'

"The use of the adjective 'joint' in this connection implies that the tariff to which it is applied is the result of agreement or mutual consent, and this implication is strengthened by express reference to the several carriers over a continuous line and the joint tariffs which they established. These terms import concurrence and assent in fixing aggregate rates for a combined service, as distinguished from the separate rates of a single carrier for transportation 'upon its route.' "

The Commission further said (pp. 332-3) in language that has equal application to the case at bar :

"But it by no means follows that one carrier can add to the duly established rates of another carrier



any amount it pleases, less than its own local rates, and publish and use that sum as a through rate to points on the line of such other carrier. Such a through rate is neither a joint rate nor a combination rate. It is obviously not a joint rate, for joint rates can be made only by the concurrence or assent of connecting carriers. It is not a combination rate, for one of its component parts has no legal existence or sanction as a separate or local rate. There must be lawful rates upon each of the roads before there can be a lawful combination of rates. Every road is free to make its own rates, but no road of its own accord can charge more or accept less than its own rates for any service it may render. \* \* \*

The report of the Commission in the *Platt Case* contains an illuminating discussion of the reasons why the principle of rate-making that would permit a railroad to do what the Columbus and Greenville has sought to do in the case at bar would promote neither the interests of the public nor the railroads (pp. 336-339). This case, of course, was decided long prior to the amendments made to the Interstate Commerce Act by the Hepburn Act on June 29, 1906, which amendments included Paragraph (4) of Section 6. This paragraph of Section 6 provided the means by which joint tariffs might be authenticated and the public apprised of the railroads participating therein. (See the historical note dealing with Paragraph (4) of Section 6, Joint Tariffs, on page 1461, Vol. II, Interstate Commerce Acts Annotated. Cf. *Dayton Iron Co. v. C. N. O. & T. P. Ry.*, 239 U. S. 446.)

The Commission, in *Coal Rates on Stony Fork Branch* (decided February 10, 1913), 26 I. C. C. 168, after referring to the amendment of 1906 to the Interstate Commerce Act, which now appears as Paragraph (4) of Section 6 of that Act, said (p. 173) :

"There is no provision in the law for the establishment of through rates by absorbing the local rates



of another carrier for the purpose of establishing through rates over a through route composed of two or more carriers over which through route no joint through rate has been fixed by the agreement."

And as late as May 10, 1937, the Commission said in *Paraffine Companies v. D. & R. G. W. R. R. Co.*, 222 I. C. C. 303, that (p. 307) :

"we have repeatedly recognized that carriers cannot establish a rate from or to a point on another carrier's line without the other's concurrence. \* \* \*"

The Commission in several cases has dealt with the kinds of rates recognized by the Interstate Commerce Act (*Through Routes and Through Rates*, 12 I. C. C. 164, pp. 166-167; *Laning-Harris Coal Co. v. M. P. Ry.*, 13 I. C. C. 154, p. 158). The Commission in the *Laning-Harris Coal Co. Case* said that there could be but one legal rate between two points—a very simple enunciation of a fundamental principle, that this rate must be either (a) the local rate if over one road, or (b) the joint rate if over a through route composed of two or more roads which have agreed as to a joint rate, or (c) a combination of separately established rates applicable on through business over a through route which does not enjoy a joint rate.

It will be seen that Tariff No. 81 of the Columbus and Greenville purports to establish rates from points on a connecting line, but that the rates thus established do not fit into the category of any one of these three classifications or kinds of rates. The so-called "rates" provided for in Tariff No. 81 are an anomaly. They are unknown to the law.

The Commission hit the nail on the head when it said in its report in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus & Greenville Railway Points* (R. 62) :



"The suspended schedules do not lawfully name or provide any legal rates whatsoever. Although the refunds vary with the distances the inbound shipments move, respondent cannot lawfully name, or vary, the inbound rate where the inbound shipment moves over some other line, and the inbound line does not concur in respondent's tariff. In order to make a lawful joint rate with other carriers, their concurrence is necessary under the Commission's tariff regulations, and under Section 6(4) of the Act. \* \* \*"

And the Court will bear in mind that the point we are here making is not that Tariff No. 81 does not comply with some rule or regulation issued by the Commission pursuant to the authority vested in it by Paragraph (6) of Section 6 of the Act, which empowers the Commission to determine and prescribe the form in which the schedules required by Section 1 to be kept open to public inspection shall be prepared and arranged, but that Tariff No. 81 is in the teeth of the statute itself (Paragraph (4) of Section 6).

In *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 553, this Court, in dealing with the validity of certain agreements that contemplated a departure from the established published rate, said (p. 596) :

"\* \* \* And as it was conceded that there was no established joint through rate, it likewise is a necessary conclusion that the shipments, even if moving on through bills of lading, should have taken these local rates, unless the latter were superseded or displaced by the special agreement."

Continuing, the Court said (p. 597) :

"\* \* \* The chief purpose of the Act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end



to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. In every substantial sense local rates and joint through rates were placed on the same level. Both were required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the Act.  
 \* \* \*

In the language of the Court in the case just cited, even if the Columbus and Greenville and its connections had agreed upon joint rates, those rates could become legally operative only by being established as prescribed in the Interstate Commerce Act. The joint rates which the Columbus and Greenville has attempted to establish from points on the lines of the St. Louis-San Francisco and the Illinois Central railroads under its Tariff No. 81, have not been established as prescribed by Paragraph (4) of Section 6.

In *Davis v. Southern Pacific Co.* (District Court, California, July 15, 1916), 235 Fed. 731, the Court had before it an agreement by the Southern Pacific Company, not included in the published tariffs, under which it undertook to reimburse the California hop growers for local charges in the way of local freight, cartage, warehouse, and similar charges necessary to transport such freight to the port of San Francisco if the hop growers would thereafter ship their freight from San Francisco via the Southern Pacific. The Court after quoting Section 6 of the Interstate Commerce Act, and also a portion of the Elkins Act, said (p. 737):

"\* \* \* From whatever angle such a contract may be viewed, the net result of its performance was to



enable hops to be shipped from California to the distant markets, through the medium of interstate commerce, at a less rate than that specified by the railroad company as the rate from California to such markets. The actual diminution in the rate was to be, of course, the amount necessary to be expended by the railroad company in the reimbursement of the shipper for all the local charges and for marine insurance. If this does not constitute a plain and substantial violation of the two provisions of the Interstate Commerce Act last hereinabove referred to, then I am unable to comprehend the meaning of language or to appreciate the force of valid statutory prohibitions."

Continuing, the Court said (p. 741) :

"\* \* \* The case would be precisely the same if defendant company instead of agreeing to reimburse plaintiff's assignors for local charges, including cartage and warehousing, had agreed to reimburse them for expenses incurred in the harvesting and curing of their hops, or some other expenditure by them previously made. The violation of the statute results not from a consideration of where the money was to go to, but from where it was to come from. It was to come from a fund which the law said might not be diminished for any purpose. \* \* \*"

The fact that the refunds to the shipper provided for in Tariff No. 81 of the Columbus and Greenville are the same as payments provided for in the tariffs of the St. Louis-San Francisco (R. 19), and of the Illinois Central (R. 26), is of no legal significance. If as a matter of law the Columbus and Greenville can refund any part of the rates paid not to the Columbus and Greenville, but to another carrier for transportation over that other carrier's line of railroad, the Columbus and Greenville can agree to reimburse a shipper for expenses incurred by that shipper in the production and harvesting of cottonseed.



As we said in the course of the reargument, if the decree of the lower court stands, the result will be to permit the railroads through tariff publication to grant rebates, to make concessions in the published rates, and to discriminate,—the very things that the Interstate Commerce Act was intended to prohibit and prevent. If the lower court is right, the Pennsylvania Railroad, which does not enjoy the volume of passenger traffic between New York and Chicago that the New York Central enjoys, can publish a rule in its passenger tariffs providing that if a passenger reaches the Pennsylvania Station in New York by bus or cab, and presents a receipt for the fare paid, or if a passenger reaches New York by the New York Central or the New Haven and presents to the Pennsylvania a receipt for the fare paid, such passenger will be given an allowance or rebate of a certain amount from the published New York-Chicago rate if he travels from New York to Chicago via the Pennsylvania. This refund might vary depending upon the means of transportation into New York, the points of origin, and the amounts paid. The result would be chaos in the tariffs and the rate structure, a chaos that would lead to the inequalities and discriminations that we had supposed were forbidden by the Interstate Commerce Act.

This Court has more than once said that the chief purpose of the Interstate Commerce Act was to secure uniformity in treatment, to prevent unreasonable rates, to suppress unjust discrimination and undue preference, and to destroy favoritism, all these being accomplished by requiring the publication of tariffs, the establishment of rates in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable except in the mode prescribed (*Kansas City Southern Ry. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 597; *New York, New*



*Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391). And the Commission with these great purposes of the Act in mind has over the years with great patience, with great labor, and with great intelligence worked out elaborate rules governing the construction and filing of freight rate publications. These rules now appear in Tariff Circular No. 20 (effective October 1, 1928). This circular contains many pages of rules dealing with joint tariffs, the list of participating carriers that those joint tariffs must show, and the forms of concurrences which must be given under the different kinds of joint tariffs (pp. 58-70).

The decree of the lower court would nullify all the work that the Commission has done to carry out the mandate contained in Paragraph 4 of Section 6 which requires the parties to any joint tariff to file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission. Indeed, the decree of the lower court repeals Paragraph 4 of Section 6, because under that decree a railroad may establish what are in substance and in effect joint rates by simply publishing in its own local tariff rates from and to points on connecting lines.

Paragraph (1) of Section 6 contemplates two general kinds of rates: local and joint. The very phrase "joint rate" implies an agreement by two or more carriers for the establishment of a joint rate. But the lower court's decree if carried into effect generally would repeal that portion of Paragraph (1) of Section 6 that provides for the establishment of joint rates. For under the decree one carrier has it within its power to publish what are in substance and effect joint rates by absorbing the line-haul charges of connecting carriers.

It is clear from what we have said that Tariff No. 81 clearly violates Paragraph (4) of Section 6. It is un-



necessary to go beyond this particular violation of the law. But it also violates Paragraph (7) of Section 6, which provides that no carrier shall refund or remit in any manner or by any device any portion of the rates specified in its filed and published tariffs.

Tariff No. 81 purports to be a transit tariff. It is not a transit tariff in any sense of the word. It does not provide for transit at a point on the Columbus and Greenville on shipments that the Columbus and Greenville brings into that point and transports from that point. It provides for a rebate from the published tariff rates of the Columbus and Greenville and its connections applying from mill points on the Columbus and Greenville, the rebate being based upon the rate paid by the shipper to another carrier for transportation over such other carrier's line.

Tariff No. 81 has wholly failed to tie up the inbound rate of the connecting carriers with the outbound rate of the Columbus and Greenville. The Columbus and Greenville is not a party to the rate of the connecting carrier from Coahoma, Miss. to Greenville, Miss., if we may use the example set out in the Commission's report in *Docket No. 28590, Cottonseed Allowances of Columbus and Greenville Ry. Co.* (R. 8). The connecting carrier, the carrier that transports the cottonseed from Coahoma to Greenville, is not a party to Tariff No. 81. Thus an inbound shipment of cottonseed from Coahoma to Greenville becomes localized at Greenville insofar as the Columbus and Greenville is concerned.

A shipment of the product manufactured at Greenville from that cottonseed and delivered to the Columbus and Greenville for transportation to Cincinnati is like any other shipment delivered to the Columbus and Greenville at Greenville. The rate lawfully applicable to such shipment is the rate applying from Greenville, and the Col-



umbus and Greenville may not refund or remit in any manner or by any device any portion of such rate. When it does so, as it undertakes to do under the provisions in Tariff No. 81, it is simply paying a rebate from the lawfully applicable rate from Greenville to Cincinnati. Moreover, this rate from Greenville to Cincinnati, which is a joint rate established by the Columbus and Greenville and its connections, is thus reduced without the consent of the other parties to the joint rate. The payment provided for in Tariff No. 81 clearly violates Paragraph (7) of Section 6.

The traffic manager of the Columbus and Greenville in his testimony refers to the refund provided for in Tariff No. 81 as an allowance (Tr. 48 in *Investigation and Suspension Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Points*). But Paragraph (13) of Section 15 permits an allowance to the owner of property only when that owner directly or indirectly renders any service connected with the transportation of property under the Interstate Commerce Act or furnishes any instrumentality therein. Obviously this is not a case where the owner of the property directly or indirectly renders any service connected with the transportation thereof. The owner has paid the published rate of the railroad that originated the cottonseed and that transported the cottonseed to the mill point. If this refund is an allowance, it is clearly in violation of Paragraph (13) of Section 15.

Counsel for the Columbus and Greenville in the course of the reargument, referred to a rule known as the omnibus clause contained in I. C. C. Tariff No. 322. We set forth this rule in Appendix B to this brief. In view of the reference made to this omnibus clause and the fact that the Columbus and Greenville is filing a brief that will presumably deal with this clause, we think it may



be helpful to the Court to comment upon the relevancy of this clause.

The point now sought to be made by the Columbus and Greenville through its reference to this omnibus rule, if we correctly understand the point, is that this omnibus rule made connecting carriers, such as the St. Louis-San Francisco and the Illinois Central, parties to Tariff No. 81. Plainly this omnibus rule has reference only to transit privileges that are local to the railroad publishing the transit privilege. Tariff No. 81 is in no sense a transit tariff. It is not a tariff that publishes transit privileges that are local to the Columbus and Greenville, for the Columbus and Greenville does not bring the cottonseed into the mill point. This tariff attempts to establish rates from points of origin on the lines of connecting carriers via the lines of such connecting carriers to a mill point, and to provide for a rebate of a part of the charge collected by such connecting carriers for transportation over their own lines, provided the product of the cottonseed moves out over the railroad of the Columbus and Greenville. This omnibus rule may not be so construed as to override the clear provisions of Paragraph (4) of Section 6 of the Act respecting the publication of joint rates.

As the Commission itself put it in its report in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Railway Points* (R. 56, 63) :

"Based on the foregoing decision (*Central R. Co. of New Jersey v. United States*, 257 U. S. 247, p. 255), the Columbus and Greenville would have the right to provide for a transit arrangement on its line. It could provide for the stopping of the commodity at the transit point and the subsequent shipment at the lawfully established joint through rate from original point of shipment to final destination, without the concurrences of its connections, but it could not establish the joint rate itself without such concurrences."



Furthermore this reference to the omnibus clause is wholly an afterthought. The Traffic Manager of the Columbus and Greenville, in the course of his testimony in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Railway Points* (and this record is here before this Court), said (Tr. 47) that he did not have to indicate the concurrence of the Mobile and Ohio in a tariff applying locally from Columbus to Greenville. He further said (Tr. 48) that the Columbus and Greenville's tariff is an allowance tariff, that the allowances are solely made by the Columbus and Greenville without requiring the participation therein of the Mobile and Ohio, and that there is nothing in the rules of the Interstate Commerce Commission requiring that the Columbus and Greenville get concurrences in a tariff publishing local rates or having strictly local application.

Now for the first time we are met in this Court with the very opposite contention: that these connecting carriers, in some way or other, through the omnibus clause, have joined themselves as parties to Tariff No. 81. If this contention respecting the omnibus clause was to be made by the Columbus and Greenville, in all fairness it should have been presented to the Interstate Commerce Commission, the tribunal that through its knowledge of technical tariff questions would have been in a position to pass upon the matter.

It is of the greatest significance that the brief of the Columbus and Greenville, filed in this Court prior to the first argument, makes no mention of the omnibus clause. The brief expressly states (p. 14) that there is no joint tariff involved in this litigation, and that Paragraph (4) of Section 6 has no application to the facts at bar. And after referring to the decision of this Court in *Central R. R. Co. of New Jersey v. United States*, 257 U. S. 247, the Columbus and Greenville states that this holding of the Court sets at rest the argument



that I. C. C. Tariff No. 81, to be valid, must have the concurrence of the connecting carriers.

The Commission under such circumstances was wholly justified in making this finding in the case at bar (R. 7):

"Briefly stated, the justification offered by respondent for its tariff I. C. C. No. 81, is that the tariff is primarily a local tariff publishing rates and rules governing transit privileges on cottonseed, in carloads, at mill points on its line; that the tariff applies locally from all points on its railroad to all mill points located thereon; \* \* \*."

The Commission made this further finding (R. 9):

"Respondent is not a party to the inbound rates on cottonseed from points on the lines of its connecting rail carriers to the named mill points on its line, and no other carrier is a party to its tariff I. C. C. No. 81."

There was also some hint in the course of the reargument on behalf of the Columbus and Greenville that the cut-back rates on cottonseed maintained by such carriers as the St. Louis-San Francisco and the Illinois Central were applied from stations on the lines of connecting railroads. The Court will see, however, from the pertinent provisions of the tariff of the St. Louis-San Francisco (Item 55, R. 22) and the tariff of the Illinois Central (Rule 55, R. 33), that the cut-back rates provided for in those tariffs apply from the *junctions of these carriers* with connecting lines on shipments originating at points on connecting lines from which no through net rates are published; that is to say, the local rate of the connecting line would apply to the junction point, and the cut-back rates would apply from those junction points as they apply on cottonseed originating at the junction points, and moving to the mill points. These rules can not be distorted into any such rule as appears in Paragraphs (b) and (c) of Item 5 of the Columbus and Greenville's Tariff No. 81 (R. 14).



These rail appellants respectfully submit that for the reasons stated, Columbus and Greenville's Tariff No. 81 is in plain violation of the Interstate Commerce Act.

- (2) Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

The cancellation of Tariff No. 81 would not operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville competes. The fact of the matter is, as we shall show, that a continuance of Tariff No. 81 operates unfairly and unreasonably against the railroads, such as the St. Louis-San Francisco and the Illinois Central, that originate the cottonseed.

The Columbus and Greenville and its competitors, the St. Louis-San Francisco and the Illinois Central, do not stand upon a plane of equality as long as Tariff No. 81 remains in effect, for Tariff No. 81 places the Columbus and Greenville in a more favorable position than do the transit tariffs of these other two railroads. A continuance of Tariff No. 81 furthermore deprives these rail appellants of their long hauls on the manufactured products of the commodities that they originate, in the face of the policy of Congress, as announced in the amendment made by the Transportation Act of 1940 to Paragraph (4) of Section 15, that the Commission shall, subject to the conditions named in the statute, give reasonable preference in establishing through routes to the carrier by railroad which originates the traffic. Tariff No. 81 converts the branch lines of these rail appellants into feeders of the Columbus and Greenville and thus destroys the capacity of these branch lines to contribute



to the system revenues of these rail appellants. The result is to jeopardize the continued operation of such branch lines. The competition created by Tariff No. 81 is wholly unfair to these rail appellants, for that competition arises from a tariff that by any standard contained in the Act must be adjudged to be an unlawful tariff. The desire of the Columbus and Greenville to augment its revenues is no justification for the continuance of an unlawful tariff.

It should be borne in mind in the first place that the transit privileges contained in Columbus and Greenville Tariff No. 81 apply not only to shipments that originate on its line, move to a mill point via its own line of railroad, and move outbound from that mill point via its own line of railroad, but to shipments of cottonseed that originate on connecting lines, such as the St. Louis-San Francisco and the Illinois Central, and that move via such connecting lines to the mill points. We may well say as did the Commission in its report in the case at bar (R. 10) :

"On the question of equality of the rates raised in the former proceeding, division 3 said :

'Instead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier.' "

The cancellation of Tariff No. 81 would, therefore, merely place the Columbus and Greenville upon an equal basis with its competitors.

We call the Court's attention, in the second place, to the fact that a continuance of Tariff No. 81 is in the very teeth of Paragraph 4 of Section 15 of the Interstate



Commerce Act as amended by the Transportation Act of 1940. Paragraph 4, as amended, provides that in establishing a through route, which the Commission is authorized to establish under Paragraph 3 of Section 15, the Commission shall not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route,

- (a) unless such inclusion of would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or
- (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation.

Paragraph 4 then reads:

*"Provided, however, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."*

What the Columbus and Greenville has done by Tariff No. 81 is to circumvent the provisions of Paragraph 4 of Section 15. If the decree of the lower court stands and Tariff No. 81 is continued in effect, the result will be to repeal both Paragraphs 3 and 4 of Section 15. For under the plan devised by the Columbus and Greenville, through routes and joint rates can be established by one



railroad acting independently through a provision in its tariff for the absorption of the rates of its connections. There can be no need of continuing in the Commission the power invested in it by Paragraphs 3 and 4 of Section 15 to establish through routes and joint rates, when one carrier acting independently on its own initiative can take the law in its hands, and through such a tariff provision as is here before this Court can establish what are in substance and in effect through routes and joint rates, without the concurrence or agreement of other carriers, and without the limitations that Congress in its wisdom in 1940 wrote into Paragraph 4 of Section 15.

It is clear, therefore, that Tariff No. 81 of the Columbus and Greenville operates unreasonably and unjustly against the St. Louis-San Francisco and the Illinois Central. The decree of the lower court striking down the Commission's order requiring the cancellation of that tariff makes it possible for the Columbus and Greenville to short-haul the St. Louis-San Francisco and the Illinois Central on commodities originated by them, moving to a transit point, there manufactured and moved to points of destination in the North and East. If the St. Louis-San Francisco and the Illinois Central are to be short-hauled, the statute contemplates that this may be done only under an order of the Commission in a proceeding under Paragraphs 3 and 4 of Section 15. No such proceeding has been had. No such order exists.

The Commission in a very recent case, *Docket No. 28647, D. A. Stickell & Sons, Inc. v. Alton Railroad Co. et al.*, mimeographed report of March 18, 1943, had occasion for the first time to construe and apply the provisions of Paragraph (4) of Section 15 of the Interstate Commerce Act as amended by the Transportation Act of 1940. The Commission in this case prescribed



through routes on grain and grain products from Chicago, St. Louis, and origins in Central Territory, via Hagerstown, Maryland, to destinations on the Pennsylvania Railroad east of York, Pa. and Fulton Junction, Md. The Pennsylvania Railroad contended among other things that even if the routes sought were necessary and desirable in the public interest, the Commission was without authority to require the establishment of such routes as they would short haul the Pennsylvania without its consent. In holding against the contentions of the Pennsylvania, the Commission placed a liberal construction upon the amendments made to Paragraph (4) of Section 15, a construction that takes into consideration not only the interest of the participating railroads but the interest of the public and the shippers.

The Commission said in one of the concluding paragraphs of its report (Sheet 10) :

“ \* \* \* Carriers in many instances availed themselves of the right to their long haul and the disadvantaged localities and shippers had no redress. It was to remedy that situation, apparently, that the second exception was added. The Commission was thereby given authority when it finds that through routes are ‘needed in order to provide adequate and more efficient or adequate and more economic transportation,’ to require the establishment of such routes although they may short haul one or more of the participating carriers. We interpret that exception to mean adequate and more efficient and more economic from the public or shippers’ as well as the participating carriers’ standpoint. \* \* \* ”

We cite this decision as marking those sections of the Act which, if the Columbus and Greenville chose to invoke them, would enable the Columbus and Greenville to obtain a determination of the question whether under the law it should be permitted to inject itself as an intermediate carrier in through routes from the points of



origin of this cottonseed on the St. Louis-San Francisco and the Illinois Central railroads to the final destinations of the manufactured product.

And the Commission not only possesses the power under Paragraphs (3) and (4), dependent upon the facts of course, to prescribe through routes and joint rates, and to deprive a carrier of its long haul, but the Commission also has the power under Section 1 of the Act to require the establishment of transit under such through routes and joint rates (*Montgomery Cotton Exchange v. L. & N. R. R. Co.*, 112 I. C. C. 325, citing *Central Railroad Co. of New Jersey v. United States*, 257 U. C. 247, p. 257).

But the Columbus and Greenville, for some reason or other, seems to be unwilling to seek a determination from the Commission on a question that lies entirely within the primary jurisdiction of the Commission on an adequate record: whether through routes and joint rates should be established from points of origin of the cottonseed in Mississippi to the destinations of the manufactured product, which would include the Columbus and Greenville as an intermediate carrier, and which would short-haul the originating carriers.

There seems to be an assumption that the transit tariffs of the St. Louis-San Francisco and the Illinois Central, which provide for these so-called cut-backs, are in some way or other unlawful. The point we emphasize is that these transit tariffs are but conventional and usual ones, and that the provision in the existing tariffs for cut-backs is one that has been recognized and approved by the Commission in many cases over many years.

In *Lawrenceville Cooperage Co. v. Akron, C. & Y. Ry. Co.*, 235 I. C. C. 155, the Commission said, in part (p. 163):



"While the instant proceeding relates only to staves and heads manufactured into cooperage, the cut-back arrangements are available in connection with various other forest products. Similar arrangements are established also for several farm products. As to many products of the forest the arrangements have been in effect for more than 40 years, some of the earlier schedules having been prescribed by State authorities."

Continuing, the Commission said (p. 166) :

"These cut-back arrangements cannot be said to be unlawful merely because they are different from transit arrangements prevailing generally for other traffic. As stated by division 3, the in-bound and out-bound movements are separate and complete shipping transactions, but there is no provision of law that prohibits their combination and the maintenance of charges that are lower than the combination of the full in-bound and out-bound charges if no shipper is thereby subjected to undue prejudice and no discrimination results. There is no necessity for a requirement that the carriers charge their full combinations or that the established method of obtaining reduced combinations be changed from the cut-back method to some other method."

There are many other cases \* in which the Commission has had before it tariffs providing for cut-backs under transit rules. The Commission has recognized that a transit arrangement that provides for a cut-back is simply one of the many forms that a transit privilege may take. The Commission itself said in *I. & S. Docket No. 4599, Allowance on Cottonseed to Columbus and Greenville Points* (R. 60) :

\* *Transit on Lumber*, 227 I. C. C. 189; *Williams Slave Co. v. Morgan's L. & T. R. & S. S. Co.*, 40 I. C. C. 165; *Brookhaven Lbr. & Mfg. Co. v. Mississippi Central R. Co.*, 132 I. C. C. 241; *Transit on Logs and Lumber*, 136 I. C. C. 125; *Elmore Veneer Co. v. Chicago, M., St. P. & P. R. Co.*, 192 I. C. C. 199; *Farmers Cotton Oil Co. v. T. & P. Ry.*, 246 I. C. C. 603.



"Transit and similar arrangements, such as provided by these cut-back tariffs, are generally conditioned upon, or granted in consideration of, the obtaining of the outbound haul of the product by the inbound carrier to the transit point. \* \* \*"

The fact of the matter is that under the transit privileges of the St. Louis-San Francisco and the Illinois Central, and also of the Columbus and Greenville, insofar as the transit privileges maintained by it are the same as those maintained by the two roads first mentioned, the result of the maintenance of such transit privileges is to establish, for transportation from the point of origin of the cottonseed to the point of final destination of the manufactured product, a through rate which is somewhat less than the combination of the locals on the mill point. Thus these railroads have but followed the principle of rate making so frequently announced by the Commission that ordinarily a through rate should be somewhat lower than the sum of the intermediate local rates. (Page 535, Vol. I, Interstate Commerce Acts Annotated.)

The effect of the establishment of the transit privilege contained in the tariffs of the St. Louis-San Francisco and the Illinois Central is to unite what would otherwise be two separate legs of a route into a through route, and to establish for that through route, which covers the movement of the cottonseed from the point of origin to the mill point and the outbound movement of the manufactured product from the mill point to the point of final destination, a through rate that is somewhat less than the sum of the rate applying for the movement of cottonseed from the point of origin to the mill point, and the rate applying on the manufactured product from the mill point to the final destination.

But the transit tariff No. 81 of the Columbus and Greenville, insofar as it provides for a refund of the



freight charges paid by a shipper to a connecting railroad for transportation service over that railroad, attempts to tie up two independent parts of a through route, when the Columbus and Greenville has no control over or connection with the first part of the route. Tariff No. 81 shows on its face that the railroads whose lines make up the first part of the through route are not parties to that tariff. Tariff No. 81 is, therefore, wholly ineffective to unite the two separate legs of the route.

We cite below \* references to recent decisions of the Commission and of the District Court in a case involving the principles and theory of transit. The Commission and the Court in their opinions gave emphasis to the fact that transit practices are an integral part of the rate structure of the country.

The transit tariffs of the St. Louis-San Francisco and the Illinois Central, and this is also true of the transit tariff of the Columbus and Greenville with respect to shipments of cottonseed originating at points on the Columbus and Greenville and moving via that railroad to its mill points, simply reflect one of the many forms which a transit privilege may take. We know of no transit rule or privilege, however, and the Columbus and Greenville has cited none to this Court, under which a carrier pays a refund to a shipper of a part of the freight charges which that shipper has paid to another railroad for transportation service rendered by such other railroad in moving a commodity into a transit point. The refund under such circumstances becomes a rebate.

What the Columbus and Greenville in substance seeks to do is to equalize by means of an unlawful tariff its

\* *Keery Co., Inc. v. New York, O. & W. Ry. Co.*, 206 I. C. C. 585; 211 I. C. C. 451; 226 I. C. C. 335; *Baltimore & O. R. Co. v. United States*, 15 F. Supp. 674; 24 F. Supp. 734. See also *Locklin, Economics of Transportation*, Tr. 629-631.



situation with respect to railroads like the St. Louis-San Francisco and the Illinois Central. Exhibit No. 2, a part of the record in *Investigation & Suspension Docket No. 4599, Allowances on Cottonseed to Columbus and Greenville Ry. Points*, shows the Columbus and Greenville to be a main line of railroad only, with no branch lines.

This Court has more than once said that the law does not attempt to equalize opportunities among localities, or fortunes or abilities (*United States v. I. C. R. R. Co.*, 263 U. S. 515, p. 524, citing *Inter. Com. Comm. v. Dittenbaugh*, 222 U. S. 42, p. 46). Nor can the law equalize all opportunities among railroads and place one railroad in a position which others occupy because of the length of their lines or the number and length of their respective branch lines.

The Commission itself, when confronted with this situation respecting the location of the railway of the Columbus and Greenville, said (R. 62) in its report in *I. & S. Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Railway Points*, that the Columbus and Greenville's disadvantage appears to be primarily one of location.

The desire of the Columbus and Greenville to tap the traffic that originates on its connections, short haul those connections and transport the manufactured product of that traffic from mill point via its own line, does not relieve it from the necessity of complying with the law.

As this Court said in *United States v. I. C. R. R. Co.*, 263 U. S. 515 (pp. 523-524):

"The effort of a carrier to obtain more business, and to retain that which it has secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates



were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Inter. Com. Comm. v. C. & G. W. Ry. Co.*, 209 U. S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates. \* \* \*

The self-interest of the Columbus and Greenville, in its effort to obtain additional traffic, cannot possibly serve as an excuse or justification for a plain violation of the law. One of the great purposes of the Interstate Commerce Act is to insure that competition among the carriers should be carried on in accordance with the standards laid down in the Act. Competition has not repealed those standards. There can be nothing unfair or unreasonable in requiring the Columbus and Greenville to abide by the law.

There is another aspect of this particular question that merits consideration by this Court. The plain and intended effect of Tariff No. 81 of the Columbus and Greenville is to deprive the St. Louis-San Francisco and the Illinois Central of their long hauls on the manufactured products of the cottonseed, cottonseed which they originate. The hauls of the St. Louis-San Francisco and the Illinois Central would be confined in respect to those shipments that the Columbus and Greenville is able to capture as the result of this unlawful tariff, to the comparatively short hauls of the cottonseed moving from points of origin on the lines of those railroads via those lines to the mill points. The record in Investigation and Suspension Docket No. 4599, *Allowances on Cottonseed at Columbus and Greenville Points*, shows (Tr. 29) that the average haul of the cottonseed from points of origin to the mill points is about 75 miles.

The Columbus and Greenville in short would deny the branch lines of the St. Louis-San Francisco and the Illinois Central the capacity to make any contribution



to system revenues of these railroads, for these branch lines would be used, insofar as the movement of cottonseed is concerned, not as branch lines feeding traffic to the main lines of the St. Louis-San Francisco or Illinois Central, as the case might be, but as branch lines built and constructed by these railroads to feed traffic to the Columbus and Greenville.

What has been the result in the past of the drying up of traffic on branch lines, and the failure of branch-line traffic to contribute to system revenues? The answer is to be found in the finance reports of the Interstate Commerce Commission dealing with the abandonment of branch lines, and particularly in the experience that the Illinois Central has had in Mississippi in the last fifteen years.

As shown by the published reports of the Commission, the Illinois Central System (the Illinois Central Railroad Company, The Yazoo and Mississippi Valley Railroad Company, and the Gulf and Ship Island Railroad Company) has abandoned during the last fifteen years some 227 miles of branch lines in Mississippi. The total length of the Columbus and Greenville Railway is only 168 miles (Record in *Investigation & Suspension Docket No. 4599, Allowances on Cottonseed at Columbus and Greenville Points*, Tr. 41). The decisions of the Commission issuing certificates of public convenience and necessity authorizing the abandonment of these branch lines are found in some twelve volumes of the Commission's finance reports. We cite in a footnote a few of these cases.\* These branch lines were aban-

\* *Abandonment of Lines By Mississippi Valley Co. and Illinois Central R. R. Co.*, 145 I. C. C. 289; *Abandonment of Branch Line By Y. & M. V. R. R. Co.*, 145 I. C. C. 393; *Helm and North Western Railroad Abandonment*, 170 I. C. C. 33; *Gulf and Ship Island R. R. Co. Abandonment*, 193 I. C. C. 749; *Y. & M. V. R. R. Co. Abandonment*, 249 I. C. C. 561; *Y. & M. V. R. R. Co. Abandonment*, 149 I. C. C. 613. See in this connection the discussion in the 56th Annual Report of the Inter. Com. Comm. for the year 1942, under the subject "Abandoned Mileage" (pp. 21-23).



done, as shown by the reports of the Commission, not only because they were operated at a loss but because they failed to contribute a sufficient amount of net revenue to the system to compensate for the losses incurred in their operation.

Under the rules of the Commission specifying the information to be furnished in applications to abandon branch lines of railroad (order of the Commission of December 27, 1941), a railroad must show not only the revenues that should be assigned to the line proposed to be abandoned and the cost of operating that line, but it must also show the operating revenues derived from traffic originating on or destined to points on the line proposed to be abandoned and handled on other parts of the railroad company's system lines, with an estimate of the cost of transporting the traffic on such system lines. The Commission then compares the results of the operations of the branch itself with the contribution that the branch makes to the net revenues of the system. The Commission then arrives at what it designates as system profits or system deficits.\*\*

But railroads like the St. Louis-San Francisco and the Illinois Central are now met with the contention that, notwithstanding the policy of Congress as set forth in the amendment made by the Transportation Act of 1940 to Paragraph (4) of Section 15 of the Act, these branch line railroads should not serve as feeder lines for the main or system lines of these railroads, but should serve, under tariffs established by the Columbus and Greenville alone, as feeders for the Columbus and Greenville. Of course, any such construction of the Interstate Commerce Act would simply lead to a greater increase of abandonments of branch lines, with all that those abandonments mean to local communities served by such lines.

\*\* See, for example, *Y. & M. V. R. R. Co. Abandonment*, 244 I. C. C. 163, p. 167; *Y. & M. V. R. R. Co. Abandonment*, 249 I. C. C. 613, p. 614.



Exhibit No. 2, prepared by the Traffic Manager of the Columbus and Greenville and offered in evidence in *I. & S. Docket No. 4599, Allowances on Cottonseed to Columbus and Greenville Ry. Points*, is a map of the Columbus and Greenville and other lines of railroad in the territory served by the Columbus and Greenville. There are six lines of the Illinois Central System that cross the railroad of the Columbus and Greenville. Three of those lines are essentially branch lines (the lines through Greenville, Moorehead and West Point).

We submit, therefore, that with the consideration we have just discussed in mind, it would not be fair to railroads like the St. Louis-San Francisco and the Illinois Central, wholly aside from the palpable illegality of Tariff No. 81, to continue that tariff in effect, the plain effect of which tariff is to deprive railroads like the St. Louis-San Francisco and the Illinois Central of system hauls on the products of traffic that they originate, and thus endanger the future operations of these branch lines, and all this without any determination by the Commission under Paragraphs (3) and (4) of Section 15 whether these originating railroads should be deprived of their hauls.

The fact should be borne in mind that the local communities now served by the branch lines of the St. Louis-San Francisco and the Illinois Central look to those railroads for transportation service and not to the Columbus and Greenville. There are, therefore, large questions respecting the public interest involved in the determination, which the Commission has never been called upon by the Columbus and Greenville to make, whether through routes should be established under Paragraphs (3) and (4) of Section 15, which would deprive the St. Louis-San Francisco and the Illinois Central of the system revenues from cottonseed originated by them on



their lines in Mississippi and transported by them to mill points.

We submit that in view of what we have said, the cancellation of the Columbus and Greenville's Tariff No. 81, the cancellation of which is required by the plain mandate of the statute, would not operate unfairly and unreasonably in any respect.

- (3) What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?**

This question in the first place seems to contemplate that even though Tariff No. 81 of the Columbus and Greenville be in plain violation of the law, nevertheless that violation should continue pending the institution of some independent proceeding in which the Commission would in some way or other make an appropriate adjustment of rates as between the Columbus and Greenville and the other carriers.

To state this question is to answer it. If there are violations of the Interstate Commerce Act they should be eliminated. And this is just what the Interstate Commerce Commission undertook to do when it made its report and entered its order of January 3, 1942, in the case at bar (R. 5-12). We had not supposed that a plain violation of law on the part of a carrier, such as the Columbus and Greenville, could be clothed with immunity for an extended period to enable the Commission to determine whether or not in some other proceeding, although the Columbus and Greenville has never asked the Commission to institute such a proceeding,



some adjustment of rates could be made as between the Columbus and Greenville and its connecting carriers that would result in increasing the revenues of the Columbus and Greenville.

In *Union Stock Yard & Transit Co. v. United States*, 308 U. S. 213, this Court had before it the question whether the Stock Yard Company was subject to the jurisdiction of the Interstate Commerce Commission. This Court, in passing upon the question whether the proffered evidence relating to other stock yards was relevant, said (pp. 223-224) :

"The issue to be resolved in the present proceeding is whether the service rendered by appellant at its Chicago stockyard brought it within the jurisdiction of the Commission. To this issue the practices by others at other yards are irrelevant and their bearing on the administrative construction of the statute in the present circumstances is, we think, too remote and indecisive to compel a burdensome inquiry into collateral issues."

The possibilities that may lurk in any future proceeding that the Columbus and Greenville may institute before the Commission are irrelevant on the question whether Tariff No. 81 violates the Interstate Commerce Act, which is the only question before this Court.

In *A., T. & S. F. Ry. Co. v. United States et al.*, 279 U. S. 768, this Court in the concluding sentence of its opinion said (p. 781) :

"\* \* \* There is also a suggestion that the Commission should have suspended and ordered canceled the Southern's varying proportional rate. Its action in that respect is not subject to review in this proceeding."

The Columbus and Greenville in its original brief made this statement (p. 6) :



"We submit that the question is not whether some other plan that would accomplish the same results and meet with the approval of the Commission, was available, but solely whether appellee's present practice is lawful."

Question (3) seems to contemplate that in some other proceeding the Commission would have the power to require an adjustment of rates that would increase the revenues of the Columbus and Greenville through a participation by the Columbus and Greenville in the movement of cottonseed originating on the St. Louis-San Francisco and the Illinois Central, moving to mill points, there manufactured and reshipped to destinations in the East. But as can be seen from our discussion of question (2), it is by no means certain in view of the changes made by the Transportation Act of 1940 in Paragraph 4 of Section 15 that this would be the result. For now Congress has spoken in unequivocal language that in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the limitations in clauses (a) and (b) of Paragraph 4 of Section 15, give reasonable preference to the carrier by railroad which originates the traffic.

We submit that the Columbus and Greenville is in a better position than this Court to determine what further steps it should take before the Commission to obtain a determination whether railroads in Mississippi, such as the St. Louis-San Francisco and the Illinois Central, which originate this cottonseed and can carry the products of the cottonseed via their lines to destinations in the North and the East, should be shorthauled. The questions that would be raised by a proceeding under Paragraphs 3 and 4 of Section 15, are questions that address themselves particularly to the administrative tribunal.



The facts before the Court in this case, when read in the light of the provisions of Paragraphs 3 and 4 of Section 15, afford no basis for the assumption which seems to be implied in question (3), that there should be some adjustment of the rates as between the Columbus and Greenville, on the one hand, and the St. Louis-San Francisco and the Illinois Central, on the other. Whether there should be, must in the first instance plainly be determined by the Interstate Commerce Commission. The Columbus and Greenville has had ample opportunity to bring a complaint under Paragraphs 3 and 4 of Section 15, seeking the establishment of through routes and joint rates. But for reasons best known to itself, it has failed to file such a complaint.

The question presented to this Court is whether the order of the Commission in the case at bar is a lawful one. We submit that this Court ought not to go beyond a determination of this issue.

**(4) Have the courts power to require the Commission to take such procedure?**

This question carries to us the implication that the Commission has not followed such a course of action in the case at bar as it should have followed. The record will not support such a conclusion. As we have seen, the question whether under Paragraphs 3 and 4 of Section 15 of the Act, the St. Louis-San Francisco and the Illinois Central which originate this cottonseed should be shorthauled, and the manufactured products thereof turned over to the Columbus and Greenville at these mill points, is a question that has been neither investigated nor determined by the Commission. The Columbus and Greenville has not called upon the Commission to investigate and determine that question.



If the Columbus and Greenville had shown the zeal, the activity, and the persistency in pursuing such rights as it may possess under Paragraphs 3 and 4 of Section 15 of the Act as it has shown in its efforts to circumvent the provisions of Section 15, as well as Section 6, the Columbus and Greenville would long ago have had an administrative determination of the question whether under Paragraphs 3 and 4 of Section 15 the St. Louis-San Francisco and the Illinois Central should be required to be shorthauled, and the Columbus and Greenville injected as a participating carrier in a through route from the points of origin of the cottonseed to the destination of the manufactured product.

The Commission itself said in its report in *Docket No. 28590, Cottonseed Allowance of Columbus and Greenville Railway Company* (R. 11) :

“ \* \* \* Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute.”

In *United States v. Morgan*, 313 U. S. 409, this Court said (p. 417) :

“We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment.”

We are at a loss to understand on what theory this Court should undertake to suggest to the Commission what the Commission should do, let alone requiring the



Commission to act, respecting an issue that has never been presented to the Commission by the Columbus and Greenville: Whether, under Paragraphs 3 and 4 of Section 15 relating to the establishment of through routes and joint rates, some adjustment should be made of the rates that would inject the Columbus and Greenville as an intermediate carrier in through routes and would shorthaul the originating carriers.

It does not appear that this Court should enter an order in this case which is predicated upon the assumption that there are or must be some readjustment of rates as between the Columbus and Greenville on the one hand and the St. Louis-San Francisco and the Illinois Central on the other. To do so the Court would be stepping beyond its functions, its duties, and its powers.

We submit that if this Court should require the Commission to take the procedure outlined in Paragraph (3), this Court would set itself up as an appellate administrative tribunal, which it has said it is not.

As this Court put it in *Los Angeles Gas Co. v. Railroad Commission*, 289 U. S. 287 (p. 304) :

"We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the Court. We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446. \* \* \*"



**CONCLUSIONS.**

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These rail appellants respectfully submit that Columbus and Greenville's Tariff No. 81 violates the Interstate Commerce Act and that the decree of the lower court should be reversed. They further submit that this is the sole question presented to this Court for determination. The Court is not now called upon to go beyond and should not go beyond a determination of this question.

Respectfully submitted,

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May 19, 1943.



## APPENDIX A.

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Interstate Commerce Act, 49 U. S. C. 1, et seq.:

SEC. 1. (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provision of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such



through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

**SEC. 6 (4)** The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

**SEC. 6. (6)** The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such



regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

SEC. 6 (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reason-



able individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the



burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15. (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of the railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

SEC. 15 (13) If the owner of property transported under this part directly or indirectly renders any



service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.



## APPENDIX B.

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Item 100-B (Cancels Item 100-A of Supplement 4).

### TERMINAL OR TRANSIT PRIVILEGES OR SERVICES

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules and regulations of originating carriers parties to this tariff, for property while in their possession, and of any of the intermediate or delivering carriers parties to this tariff for property while in their possession, as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission as to interstate traffic, and with State Commission covering traffic subject to its jurisdiction, for

Terminal or transit privileges or services, including also

Car rental,	Icing,	Storage,
Car service,	Lighterage,	Switching,
Cartage,	Loading,	Transfer,
Demurrage,	Private car mileage,	Transit privileges,
Diversion,	Reconsignment,	Unloading,
Elevation,	Refrigeration,	Weighing.
Heater service,	Stop-off,	

The granting of the privileges and performance of the service described in this item shall be entirely upon the responsibility and at the cost of the carriers granting the privileges and performing the services and without affecting the revenue of any other carrier in the absence of authority therefor from such other carrier.

( Auth DA 60785 / 12-14-38 ).



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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1942

---

**No. 628**

---

INTERSTATE COMMERCE COMMISSION, Et AL.

*Appellants,*

*v.*

COLUMBUS AND GREENVILLE RAILWAY COMPANY.

*Appellee.*

---

**MOTION TO DISMISS APPEAL  
OR TO AFFIRM**

---

ATTORNEYS FOR APPELLEES:

ROBERT C. STOVALL,

Columbus, Mississippi.

FORREST B. JACKSON,

Jackson, Mississippi.

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IN THE  
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*Appellants,*

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*Appellee.*

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**MOTION TO DISMISS APPEAL  
OR TO AFFIRM**

---

**MOTION OF APPELLEE TO DISMISS APPEAL OR  
IN THE ALTERNATIVE TO AFFIRM AS PRESENTING  
NO SUBSTANTIAL QUESTION REQUIRING FURTHER  
ARGUMENT.**

*May It Please the Court:*

The Columbus and Greenville Railway Company, Appellee, now respectfully moves this Honorable Court to



dismiss this appeal, or in the alternative, to affirm as presenting no substantial question requiring further argument, under the provisions of *Rule 7, Paragraphs 3 and 4*, and in support of this motion would, with respect and deference, show and urge the following:

# I.

The appeal was not perfected within thirty (30) days as required by *U. S. C. Title 28, Section 47* (Act of October 22, 1913, 32, 38 Stat. 220), which provides that appeals from an order granting or denying an interlocutory injunction after notice and hearing shall be "*taken within thirty days after the order \* \* \**" "*and upon final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.*"

The order here, suspending and setting aside the order of the Commission, was entered on August 17, 1942. The petition for appeal was presented and allowed on October 14, 1942, exactly fifty-eight (58) days later. The appeal was perfected sometime later. (Tr. 76).

True, *U. S. C. Title 28, Section 47a*, provides: "A final judgment or decree of the district court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court \* \* \* if appeal \* \* \* be taken by an aggrieved party within sixty (60) days after the entry of such final judgment or decree, \* \* \* And in such cases the notice required shall be served upon the defendants in the case and upon the Attorney General of the State." (Tr. 75).

Thus demonstrating that the appeals there referred to are those in which the State has some direct interest, which does not apply in the instant case.



Therefore, *U. S. C. Title 28, Section 47*, here applies and the Court is without jurisdiction, since the appeal came too late.

*Hartford Acci. & Indemnity Co. v. Bunn*, 285 U. S. 169; 76 L. Ed. 685.

### I-A.

The appeal here was attempted to be allowed by the District Judge, without concurrence of either of the other judges composing the statutory Three-Judge Court, and should be dismissed. (Tr. 76).

*Rule 36, of the Revised Rules of the Supreme Court of the United States* seems to permit the procedure followed in attempting to obtain the appeal here, in that said *Rule 36*, provides that an appeal from a district court to the Supreme Court may be allowed "by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court."

However, *U. S. C., Title 28, Section 47*, provides in part: "and upon final hearing on any suit brought to suspend or set aside, in whole or in part, any order of said commission *the same requirement as to judges and the same procedure as to expedition and appeal shall apply.*" (Italics ours).

Compare: *U. S. C., Title 28, Section 792.*

We submit, with deference, that the statutory provision controls and that "the same requirement as to judges" applies to all matters finally disposing of the cause, such as the granting of the petition for appeal, especially since the statute requires "the same procedure as to expedition



and appeal shall apply." That the Statutory Three-Judge Court must act through a majority concurring as to all matters, involving the effort to suspend or set aside an order of the Interstate Commerce Commission, seems to us required under the above provision.

An analogous situation is presented on writs of error, now appeals, from the Highest Appellate Courts of a State, and the requirement of statute and by *Rule 36, paragraph 1*. No other judge except the Chief Justice, or Presiding Justice of the State Court, or a Justice of this Court can allow an appeal, and the requirement has long been held to be jurisdictional.

Compare: *Bartemeyer v. Iowa*, 81 U. S. (14 Wall.) 26, *Gleason v. Florida*, 76 U. S. (9 Wall.) 779, and, *Butler v. Gage*, 138 U. S. 52.

The appeal for this further reason should be dismissed.

## II.

If the Motion to Dismiss is denied, then in the alternative, the Appellee urges to affirm because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The District Court found that "the facts in the case are not in dispute." And: "The testimony shows without dispute that this tariff is profitable to plaintiff; that by its provisions and enforcement none of the capital investment of plaintiff is impaired; that the connecting carriers receive the entire proceeds from the rates as published applicable to them; and that plaintiff absorbs the entire amount of this cut-back. The testimony shows too that it does not vary in any respect whatsoever from the published tariff." (Tr. 68).



District Court in commenting on the findings of the Commission said:

"The Commission did not find that the tariff was unreasonable, unjust or discriminatory, but determined that the form and manner in which the tariff is published does not conform to the requirements of Section 6(4) and 6(7) of the Act, and that it was unlawful by virtue of Section 1(6) of the Act. The Commission was without power to declare the tariff unlawful unless it found from the evidence as a fact that the tariff was in violation of 6(4) and 6(7) or otherwise violated 1(6)." (Tr. 68).

Compare: *Splawn, Commissioner, dissenting.* (Tr. 11-12).

Appellants urge in Jurisdictional Statement, contrary to the above holding:

"The question presented by this appeal is a substantial one. It involves an interpretation and application of Sections 1(6), 6(4) and 6(7) of the Interstate Commerce Act in relation to the publication and establishment of joint rates. Aside from the local situation immediately affected, the decision of the lower court has established principles relating to the publication of joint rates which will have far-reaching effect. Since these principles are contrary to the well-recognized concept of joint rates, it is important that the Supreme Court pass finally upon them."

There is nothing in the entire record here, especially is there nothing in the decision of the District Court that affects joint rates. The District Court decided the issues presented under well-recognized principles of applicable law having to do with the reasonableness, justice and non-



discriminatory character of the tariff of the Appellant, which affects only the Appellant and has nothing to do with joint rates, as was found as a matter of law.

Substantial questions were settled by prior decisions of this Court in the following cases:

*I. C. C. v. Delaware, etc., Railway*, 220 U. S. 235,

*I. C. C. v. L. & N. R. Co.*, 227 U. S. 88,

*I. C. C. v. B. & O. R. Co.*, 145 U. S. 265,

*Atchison T. & S. Ry. Co. v. U. S.*, 279 U. S. 768, especially,

*T. & P. Ry. Co. v. I. C. C.*, 162 U. S. 197.

With which compare the following on substantial question here:

*Alabama v. U. S.*, 279 U. S. 229,

*McArthur v. U. S.*, 315 U. S. 787,

*Zucht v. King*, 260 U. S. 174, 176.

*St. Louis and O'Fallon R. Co. v. U. S.*, 279 U. S. 461,

*Werk v. Lorain Street Savings & Trust Co.*, 299 U. S. 512.

*I. C. C. v. I. C. R. R. Co.*, 215 U. S. 452.

Therefore, the actual questions presented by this record have already been determined and the matters now sought to be injected were not necessary to be considered, or decided and are so unsubstantial as not to require further argument. The Cause should be affirmed.



## CONCLUSION.

For the reasons above stated, urged and argued, the Appellee respectfully with deference submits that the Appeal should be dismissed; and, in the alternative, if in this mistaken, that the cause should be affirmed as presenting no substantial question requiring further argument.

Respectfully submitted,

COLUMBUS & GREENVILLE RAILWAY COMPANY,

Appellee.

By: *Robert C. Stovall*  
 ROBERT C. STOVALL,  
*Forrest B. Jackson*  
 FORREST B. JACKSON,  
 Its Attorneys.

## CERTIFICATE OF SERVICE.

I, Forrest B. Jackson, of Counsel for Appellee, hereby certify that I have this date served on Daniel W. Knowlton, Chief Counsel, and Daniel H. Kunkel, Attorney for the Interstate Commerce Commission, and on John E. McCullough, Attorney for J. M. Kurn and John G. Lonsdale, Trustees of the St. Louis-San Francisco Railway Company; and, on Erle J. Zoll, Jr., Attorney for Illinois Central Railroad Company, all of the Appellants herein, a true and correct copy of the foregoing Motion, by mailing postage prepaid to their respective addresses.

This the 11th day of March, A. D., 1943.

*Forrest B. Jackson*  
 Of Counsel.



FILE COPY

No. 628

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*In The*  
**Supreme Court Of The United States**

OCTOBER TERM, 1942

INTERSTATE COMMERCE COMMISSION, J. M. KURN  
AND JOHN G. LONSDALE, TRUSTEES OF THE ST.  
LOUIS - SAN FRANCISCO RAILWAY COMPANY,  
AND ILLINOIS CENTRAL RAILWAY COMPANY,  
*Appellants*

COLUMBUS AND GREENVILLE RAILWAY  
COMPANY, *Appellee*

*Writ taken from the District Court of the United States  
and the Southern District of Mississippi - the Eastern  
Division.*

**BRIEF FOR THE COLUMBUS AND GREENVILLE  
RAILWAY COMPANY, APPELLEE**

W. H. 154

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**In The  
Supreme Court Of The United States**

OCTOBER TERM, A. D., 1942

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**No. 628**

INTERSTATE COMMERCE COMMISSION, J. M. KURN  
AND JOHN G. LONSDALE, TRUSTEES OF THE ST.  
LOUIS - SAN FRANCISCO RAILWAY COMPANY,  
ET AL, *Appellants*

*v.*

COLUMBUS AND GREENVILLE RAILWAY  
COMPANY, *Appellee*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI. EASTERN  
DIVISION

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**BRIEF ON BEHALF OF APPELLEE**

This is an appeal from an unanimous decision and final decree for a permanent injunction of a statutory Three-Judge Court holding invalid the order of the Interstate Commerce Commission, in cause entitled *Cottonseed Allowances of Columbus and Greenville Railway Company*, 248 I. C. C. 441 (R. 66-72).

The appellee, the plaintiff below, brought suit under the "Urgent Deficiencies Act" of October 22, 1913; c. 32,



38 Stat. 220, in the Federal Court for the Northern District of Mississippi, Eastern Division, to set aside an order entered by the Interstate Commerce Commission holding that appellee's Freight Tariff No. 9-B, I.C.C. No. 81, was unlawful and in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act (R. 11). The appellant carriers that had intervened in the proceeding instituted by the Commission were made defendants in said suit. As a part of this brief we adopt the opinion of the lower court (R. 66-70), *Columbus and Greenville Railway Company vs. U. S., et al*, 46 F. Supp. 204.

For an understanding of the facts, reference should be made to certain provisions of each of the appellants' "cut-back" tariffs placed in evidence.

The Illinois Central tariff contains this language:

"Rule 30 (b) The rates shown in Section No. 2 must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates applicable to manufacturing or mill station proper, in effect on date of shipment from point of origin and freight charges will be collected by the agent at such rates upon delivery." (R. 31, 47).

The Frisco tariff, ITEM 5 (b) provides:

"The rates shown herein must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates applicable to manufacturing or mill point proper, in effect on the date of shipment from point of origin, and freight charges will be collected by the agent at such rates upon delivery." (R. 19).

Neither of these tariffs shows the concurrence of any other carrier.

Item 5 of the Columbus and Greenville's tariff I.C.C. No. 81, which is in issue, is in substantially the same language. (R. 14 (c) ). Also the provisions with reference



to the application of the appellant carriers' cut-back tariffs are the same as those of appellee's tariff as they relate to the procedure by which the shipper of cottonseed products from the mill point obtains a refund upon the surrender of inbound freight bills along with evidence of shipments of products of cottonseed outbound.

The only difference between appellee's and appellants' tariffs is that the appellee does not discriminate between shippers of rail cottonseed products from the mill point, whereas appellant carriers only make a refund to those shippers of products who transport the seed to the mill point over their lines. This privilege incorporated in appellee's tariff I.C.C. 81 equalizes the net charge to the shipper for the total haul of the cottonseed and products thereof with charges resulting from the application of the tariffs of appellants at competitive points. "The refunds, or cut-back, are exactly the same in amount as those of the other carriers serving the mill point." (R. 8-9).

As found by the Commission: "The purpose of making the refund is to enable it (appellee) to compete for traffic that might otherwise move outbound over the line that originated the seed." (R. 9).

The Commission also found this: "The originating lines hold themselves out to cut-back their local inbound rates on the seed which they originate *in order to induce the shipper to move the outbound products over their lines.*" (Italics ours.) (R. 9).

The Commission further found that: "If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee's) tariff as the inbound shipments move from origin points to the mills at the local rates under separate bills of lading." (R. 9-10).

The Commission, in its majority report, (R. 11), without stating any reason for its holding, found that to the extent appellee's tariff provides for a refund, or cut-back,



to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful and in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act.

## ISSUE

The issue presented is whether the transit privilege, or practice, in appellee's tariff I. C. C. No. 81 violates the provisions of the Interstate Commerce Act as found by the Commission. In other words, is the tariff, per se, unlawful?

## ARGUMENT

When cottonseed moves from origin to common mill point over the lines of appellant carriers, the rate as filed and published in their local tariffs is assessed and collected, and all obligations between the shipper, carrier and consignee as to that traffic are ended or discharged. Only after the seed have been manufactured into various products, as oil, meal, cake, linters, etc., and subsequently moved outbound, does the cut-back tariff of appellee or appellants come into operation. The seed at the mill point are "free seed"; so are the products manufactured from them. On the foregoing there is no dispute. Unless the appellee, by means of its tariff I.C.C. No. 81, ordered canceled by the Commission, is permitted to offer the same concession to the shipper as its competitors, it will be placed at a disadvantage, that is, deprived of an opportunity to compete for the outbound traffic. This fact is emphasized by the testimony of appellants' witness Hall before the Examiner. We quote from page 41, Stenographers' Minutes Before The Interstate Commerce Commission, Docket No. 28590, a part of the record before the Court, but not printed:



"Q. (By Mr. Hawkins). Let's take the shipment of cottonseed, Mr. Hall, from New Albany, Mississippi, that comes into Columbus—(Over the Frisco)—I believe you testified that.

"A. That is right.

"Q. Now, assume that the tariff of respondent, I.C.C. No. 81, is cancelled. If that shipper elected to ship out over the C. & G. instead of over your line, wouldn't it cost him a premium?

"A. No.

"Q. He would not get a refund under your tariff, would he?

"A. He would be silly to ship out over the C. & G.

"Q. That doesn't answer the question, Mr. Hall.

"A. I think it does.

"Q. You said he would be silly to ship. Why should he be silly?

"A. Because he would lose money.

"Q. That is the question I asked. It would cost more to ship out over the C. & G. than it would over the Frisco?

"A. I am answering the question; you are asking them.

"Q. It would cost more to ship out over the C. & G.?

"A. Yes, it would cost more."

It is appellee's contention that the inbound carrier of the cottonseed to the mill point has no inherent or vested right to the outbound haul of the products manufactured from the seed.



We submit our position is sustained by this Court in *Atchison, T. & S. F. Railway Company v. United States*, 279 U. S. 768; 73 L. ed. 947. Speaking of the tie-up of outbound traffic by means of so-called transit tariffs, the Court said:

"This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. \* \* \* There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates."

The appellee's cut-back tariff gives all shippers similarly situated the same concession, advantage or opportunity. It discriminates against none, nor is prejudicial to any. It only gives the shipper a freedom of choice of routes and the appellee the freedom of solicitation of freight and thereby voids the monopoly on this admittedly free traffic that appellant lines hold by means of their cut-back tariff.

Appellee, before using self-help to meet competition by filing its tariff in issue, I. C. C. No. 81, first endeavored, without success, to persuade the appellant carriers to cancel the cut-back practice—*Stenographers' Minutes*, pages 15-23, unprinted record. The only other alternative for the appellee, a short line that does not reach the primary markets of the cottonseed products, was to seek a system of proportional rates that would equalize the appellant carriers' cut-back rates. This would require a new and complex publication of rates to thousands of points throughout the United States and necessitate the concurrence of all connecting and intermediate carriers for its adoption. Even if such a plan could be effected, there was no assurance that the appellee's competitors in the case at bar would not increase their cut-back rates and thereby render futile its efforts to obtain equality of competition. We submit that the question is not whether some



other plan that would accomplish the same results and meet with the approval of the Commission, was available, but solely whether appellee's present tariff practice is lawful.

Division 3 of the Commission, in its report of May 3, I. & S. Docket No. 4599 (R. 56), which had under consideration an amendment to the tariff in issue, was apparently influenced by the failure of appellee's competing carriers to extend their cut-back arrangement to products of seed that moved to the mill point over appellee's line. We quote from the report:

"Respondent's tariff I. C. C. No. 81 for the first time provided for cut-backs, even though the inbound movement was over another line. That tariff and its succeeding issue now under suspension are unique in this respect. Instead of placing itself on equal basis with its competitors, respondent's present effective (I. C. C. No. 81) and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier."

The fallacy of this reasoning is that there was nothing to prevent appellee's competitors from adopting the same practice.

The Commission, in that case, further held that:

"If respondent's suspended issue could be found lawful, it would follow that similar tariffs published by the trunk lines serving the mill points would likewise be lawful. (We submit this observation is without legal significance). The result would be, if such action were taken, that the advantage gained by respondent from its tariff would be substantially offset by similar action of the competing lines, and all carriers would then transport outbound traffic at lower rates than those now lawfully in effect.



"The cut-back rates and tariffs of the trunk lines are not here in issue, and nothing in this report is to be construed as either approving or condemning them."

The appellee here, as in the prior case, seeks no advantage over its competitors, but it did not propose to remain inert and permit its competitors to secure undue advantage under their cut-back rates without attempting to adopt lawful means to meet such unfair competition. At the hearing, in case at bar, Stenographers' minutes, page 15, appellee offered to make no objections to the adoption by appellants or any connecting carrier of the same type of tariff, and stated, too, that it would join in an effort to eliminate the unfair provisions of the cut-back tariffs. Further, it has agreed of record, Stenographers' minutes, page 16, that it will likewise eliminate cut-back features from its own rates and establish the so-called cut-back rates as normal rate for the movement of cottonseed, provided the connecting carriers will adopt this policy. Thus we submit that any argument that the Columbus and Greenville, by its tariff in issue, is seeking an advantage or preference that will be lost by the filing of a similar tariff by its competitors loses its force.

In its Report in the case at bar Docket No. 28590, the Commission again refers to the appellants' tariff (R. 10), by stating: "The legality of interveners' tariff is not in issue."

The investigation of the appellee's tariff, resulting in the order for its cancellation, was upon the Commission's own motion. We submit it was inequitable to restrict the investigation to appellee's tariff and leave its competitors' tariffs in effect, to frustrate the appellee in its efforts to use self-help by lawful means, its tariff in issue, to meet a competitive situation.



The Commission points to no fact or makes no finding from which it may be concluded that the cut-back practice in appellee's tariff is unreasonable. The position of appellee in the instant case is analogous to that of appellee in: *United States of America, Interstate Commerce Commission, Illinois Central Railroad Company, et al v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al*, 294 U. S. 499; 79 L. ed. 1023.

The Milwaukee road sought to reduce its rates so as to place it on a parity with its competitors. The schedule was disapproved by the Commission, and the Milwaukee promptly commenced suit for an injunction. The carrier took the position: (1) That the order of the Commission was not supported by the findings; and (2) That, irrespective of the findings, it was not supported by the evidence. (The same is analogous to appellee's position here.) The District Court gave a decree for the complainant upon the second ground without passing upon the first. The Commission and intervening railroads appealed to the Supreme Court. We quote from the opinion affirming the decree:

"This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States*, 282 U. S. 194, 215, 76 L. ed. 291, 304, 51 S. Ct. 119; *United States v. Baltimore & O. R. Co.*, 293 U. S. 454.

"In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida v. United States*, 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119 *supra*. Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning."

In the case at bar the Commission gives an extended narrative discourse upon the operation of appellee's tariff,



the tariffs of its competitors, the purpose for which the tariff was filed, the fact that same would not be needed but for the cut-back tariffs of its competitors, and the further fact that the tariff is only a means to equalize the rates applicable to the movement of cottonseed to mill points therein named, and the movement of the products manufactured therefrom to destinations over routes of appellee and its connecting lines, with the rates over the routes of appellant carriers, all of which is not disputed; then without in any wise pointing out wherein the practice is unjust or unreasonable, which is the only thing prohibited by section 1 (6) of the Act, the Commission declares same unlawful.

In the Milwaukee case, the Court further held:

"A carrier is entitled to initiate rates and in this connection to adopt such policy of rate making as to it seems best." \* \* \* (Procedure of appellee in case at bar).

"Subject to these tests, the finding by the Commission that the new rates are unreasonable is seen to be nothing more than a deduction from the paragraph immediately preceding, wherein we learn that the schedule, if put into effect, will disrupt the rate structure in Indiana and related areas and disturb groupings and differentials maintained for many years. This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle. \* \* \*"

"Every change of a rate schedule, either voluntary or involuntary, is a disruption pro tanto of the rate structure theretofore prevailing. Plainly such a disruption without more is no sufficient reason for prohibiting a change. \* \* \*"



"We are warned by the new report, however, that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana, and this in turn to new reductions by lines in Illinois and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. The threat of such a war may be a reason for rejecting a new schedule if the rate relation previously existing is a fair one, or even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat. Neither of these conditions is satisfied in this case. The Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between the Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion. The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. \* \* \* \*

"In the light of these considerations it is not the Milwaukee that is subject to the reproach of dealing with the matter piecemeal. All that the Milwaukee has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside. Cf. *Anchor Coal Co. v. United States* (D.C.) 25 F. (2d) 462; *Atchison, T. & S. F. R. Co. v. United States*, 279 U. S. 768, 773, 73 L. ed. 947, 950, 49 S. Ct. 494. The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has



<sup>2</sup>/<sub>2</sub> put off to an indefinite future the remodeling of the rate structure for all the carriers affected, and which has left this particular carrier helpless in the interval. In brief a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come."

We submit that the rate relation existing in the instant case was unfair until appellee's tariff I.C.C. No. 81 was filed. It was so unfair that at the hearing appellants' own witness was moved to exclaim that a shipper "would be silly to ship out over the C. & G." if it was cancelled because "he would lose money." (Pg. 41, Stenographer's Minutes, *supra*).

We submit that the ruling of the Commission in the instant case is subject to the same criticism made by this Court in the Milwaukee case.

The appellant's argument that the appellee's tariff attempts to name rates on its connecting lines without their concurrence is not supported by the facts. The tariff does not even name rates, as that term is generally accepted, on appellee's own line, much less its connecting lines. It expressly stipulates in Item 5 (c) :

"The rates published in this tariff, must *not* be used in waybilling shipments. All shipments must be waybilled at full local or joint rates, lawfully applicable to manufacturing or mill point proper, in effect on date of shipment from point of origin."

The word rates in appellee's tariff, as in those of the appellant carriers, is used as a basis for allowance or refund, and this refund only becomes operative after a shipment of the cottonseed product has been made over the



carrier's line at full published tariff rates applying from the manufacturing or mill point. In no instances are the cut-back tariffs used by any of the carriers' agents in assessing transportation charges on the inbound seed or outbound product.

These cut-back tariffs are used by the carrier's freight claim agents for the purpose of computing refunds to shippers. They operate as many other transit privilege tariffs do in that their use is open to the public generally and applies to all shippers similarly situated. The refund allowance is solely at the expense of the carrier publishing the tariff. The fact of filing and publication removes any charge of unlawful rebate or refund of a published rate. See: *American Sugar Refining Co. v. Delaware, Etc. R. R. Co.*, 207 Fed. 733.

Section 6 (7) of the Interstate Commerce Act, relied upon by the Commission, does not prohibit refunds. It only prohibits the carrier from making a refund that is not specified in a tariff filed and published in accordance with the Act. We quote from the pertinent parts of Section 6 (7):

"Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified (in published tariffs), nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, *except such as are specified in such tariffs.*" (Italic ours).

The refund practice in appellee's tariff I.C.C. No. 81 is not condemned by section 6 (7), since it is lawfully filed and published with the Commission.

Appellee has never claimed that all refunds or practices are entitled to immunity from the Commission's scrutiny by merely being published in a tariff. But we do insist that the publication places the burden upon those



attacking the tariff provision to show that it unjustly discriminates so as to result in undue preference or disadvantage to persons or traffic similarly situated, or that it is otherwise unlawful. No such proof has been adduced in the case at bar. The decisions of this Court relied upon in the briefs of appellants, as we will point out later, confirm rather than oppose this view.

It is merely sophistry to argue that the appellants' tariffs are legal because they make the refund out of freight charges collected from the first leg of the journey, whereas appellee makes the refund out of freight charges collected from the last leg of the journey. We submit neither the Commission nor the Court is interested in the source from which the carrier obtains the money with which to satisfy its tariff practice so long as the rates are reasonable, there is uniformity of rates to the shippers, and the business is profitable to the carrier. There is no dispute as to the fulfilment of these conditions in the instant case.

Section 6 (4) is also referred to by the Commission to sustain its finding. This section provides:

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

There is no joint tariff involved in this litigation, and this reference has no application to the facts at bar. Nor is appellants' argument improved by saying that the Commission has considered sections 6 (4) and 6 (7) together and has construed them as preventing a single carrier, party



to a joint tariff, from refunding any portion of a rate published in a joint tariff without the concurrence of the other participating carriers. Such construction finds no support in the plain language of the Act and is in conflict with the decision of the Supreme Court, in *Central Railroad Co. of New Jersey v. United States*, 257 U. S. 247, where the Court held that a carrier may provide for a transit privilege on its line by its individual tariff and without the concurrence of other carriers. We quote from the opinion, page 255:

"Whether the privilege shall be granted or withheld is determined by local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of, and without consulting, connecting carriers."

We submit the holding of the Supreme Court sets at rest the argument that appellee's tariff I. C. C. No. 81 to be valid must have the concurrence of its connecting carriers, appellants here. This tariff I.C.C. 81 publishes practices that match the practices of appellants' tariffs (R. 18-53) by equalizing the net rate to the shipper and giving all similarly situated a free choice of routes.

Since there is no issue of discrimination or unreasonable prejudice or unreasonable preference involved in this case, we will not attempt to go into the cases cited by appellant carriers in their brief, such as *Lehigh Valley Railroad Co. v. United States*, 243 U. S. 444, 61 L. ed. 839, and *Merchants Warehouse Company v. United States*, 283 U. S. 501, 75 L. ed. 1227. For these were cases involving departures from published tariffs and the making of refunds or payments not provided by any tariff. Here the appellee by its tariff accords the same concession to every



shipper. Every shipper receives equality of rates, and there is a competitive situation met by the tariff.

The observation of the Supreme Court, in reviewing a decree dismissing proceedings begun by the Interstate Commerce Commission against a Railway Company in *Interstate Commerce Commission v. Chicago Great Western Railway Company, et al*, 209 U. S. 108, 118; 52 L. ed. 705, 712, supports appellee's position in the instant case. There the Great Western Railway made a reduction in its rates, as testified to by its President, "for the purpose of securing a greater proportion of the traffic in the products of live-stock than it had been previously able to obtain." The Court said:

"It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. As said in *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45, 51, quoting from the opinion in 5 Inters. Com. Rep. 697, 21 C. C. A. 59, 41 U. S. App. 466, 74 Fed. 723:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, — free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.'"



## ANSWER TO APPELLANTS' BRIEF

The appellant carriers' case is bottomed on this statement taken from their brief, pg. 26. "The fact is that the tariff purports to name rates on cottonseed from stations on other lines to mill points on the Columbus & Greenville which moves solely via the lines of such other carriers." We submit appellants' statement is without factual basis or legal significance. The seed moving to the mill point over appellants' line move under a bill of lading and waybill issued by appellant; the shipper pays the transportation charges to appellant upon arrival at destination according to the rates published in appellants' own tariff. The seed then becomes "free seed," *Atchison, Topeka & Santa Fe Railway Co., et al v. United States, et al*, 279 U. S. 768. Neither appellee's tariff I.C.C. 81 nor any of the appellants' tariff prescribing the "cut back" are used in waybilling or assessing the freight charges in the first instance. What are denominated rates are in fact the factors used in arriving at the net rate when the shipper subsequently ships the products manufactured from the seed. These factors, mile for mile, are exactly the same in all the tariffs whether appellee or appellant—C. & G. Tariff (R. 18), Frisco Tariff (R. 24), Illinois Central Tariff (R. 51). Again, we submit that without appellee's tariff the aggregate charges between competitive points for the movement of manufactured products over appellee's line from seed originating on appellants' line would be greater, resulting in discrimination against the shipper as to charges paid, restriction in choice of route, and prejudice to appellee in the loss of business for which it is entitled to compete.

In the brief of the learned counsel for the Commission, we find these very frank, and we submit controlling statements in regard to appellee's tariff:

"The basis for computing the refund is such that when the appellee secures the outbound shipment of



products processed from seed brought inbound to the mill point by another railroad, the aggregate net amount payable by the shipper for the inbound and outbound movements is the same as if his traffic were handled both in and out of the mill point by the other railroad." Pg. 9.

"The Commission stated in substance that the purpose of the appellee in making the allowance was to enable it to compete for the outbound products thereof by meeting the allowances held out by such roads when originating the inbound shipment; that it was true, as urged by the appellee, that its tariff, offering such allowances, would not be necessary except for the tariffs of the other roads." Pg. 14.

The foregoing is a true statement of the reason for and purpose of appellee's tariff in issue and the practice expected by it. Any discussion which seeks to reinforce the untenable conclusion that the tariff operates to refund a part of another carrier's inbound rates on seed and absorbs the refund out of a joint outbound rate on the products simply produces "organized confusion" of the subject.

Again learned counsel says:

"The Commission's findings were not made in criticism of the end which the tariff was intended to accomplish, but were to the effect that the form and manner of the provision by which it was undertaken to accomplish the desired end did not conform to the requirements of the Act, etc." Pg. 17.

The plain language of appellee's tariff makes it crystal clear "The rates published in this tariff must not be used in waybilling shipments." (R. 14). Then how can it be said with any degree of accuracy, as asserted in page 26, Carrier's brief, that "The tariff purports to name rates on cottonseed from stations on other lines to mill points on



the Columbus & Greenville which moves solely via the lines of such other carriers”?

Appellant carriers submit “The title page of the tariff here in issue would indicate that it provides transit privileges, a matter of sole concern to the Columbus & Greenville.” Page 26. Compare *Central Railroad of New Jersey, et al. vs. United States, et al*, 257 US 247. The tariff does exactly what appellants say its title indicates. It does not in any wise purport to name rates, or the division of rates with any other carrier. It is a transit privilege granted to the shipper, to permit his election of routes over which joint rates are in effect, the cost or burden of the privilege being upon appellee alone from its general revenues.

The tariff here in question does not purport to publish any through rate on cottonseed products but allows to the shipper certain privileges if he has complied with the conditions of the tariff.

Compare: *Central R. Co. of New Jersey v. U. S.*, 257 U. S. 247, 66 L. ed. 217.

We submit that there is no requirement of concurrence in the establishing of such privileges as the tariff here affords, in permitting the shipper liberty of choice and freedom to elect routes, where ultimate charges for transportation under the privilege are made uniform and equal. The tariff not being a joint one, the provision of Section 6 (4) of the Act requiring concurrence of parties, is not applicable.

We have examined the decisions of this Court cited in the brief of appellant carriers and the Commission. They are in no wise in conflict with the holding of the lower Court. In no instances have the appellants attempted to point out other than by general allegation any inconsistency.

We submit there is no issue of disputed fact in this case and the correctness of the Commission's findings there-



from. The sole question is the correctness of the legal principles adopted by the Commission as a basis for reaching a conclusion from its findings.

This proceeding was commenced by the Commission on its own initiative by authority of section 15 (1) of the Act, which empowers it after full hearing and finding that any individual or joint rate charged for transportation of property or persons or that any individual or joint practice, etc. of a carrier "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter" to prescribe just and reasonable rates and just, fair, and reasonable practices, etc. In not one line of its opinion or findings did the Commission say the practice prescribed in appellee's tariff was unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial. Counsel for appellant Commission points out in his brief "The end sought was not criticized by the Commission".

We submit the only remaining question is: Does the proviso "otherwise in violation of any of the provisions of this chapter" sustain the Commission's order? As Commissioner Spiawn, in his vigorous dissent, pointed out (R. 12): "Nor does the report indicate wherein the provision in issue violates section 6 (1) and (4)". Section 6 (1) simply requires the filing with the Commission by the carriers of all schedules of rates, fares, charges, practices and allowances. It has never been asserted that appellee's tariff was not so filed or that it was ambiguous. As to section 6 (4), we have heretofore pointed out at length that the tariff in issue was not a joint tariff; and, therefore, no concurrence of connecting lines was necessary.

To hold the tariff practice invalid under section 1 (6) of the Act it must be found to be unjust and unreasonable, and no such findings were made.



The allowance or refund practice is published in tariff form and therefore conforms to section 6 (7). It has never been contended that the allowance was for transportation service performed by the shipper and permitted with limitations by section 15 (13) of the Act. This is a red herring dragged in by appellant carriers.

Learned counsel for the Commission at page 36 of his brief cites the decision of this Court in *U. S. v. American S. & T. Plate Co.*, 301 U. S. 402, 81 L. ed. 1186, which condemned the allowances published in carrier's tariffs as sustaining appellants' position here. After an accurate synopsis of the case, counsel concludes "the allowances paid therefor constituted unlawful refunds in violation of section 6 (7) of the Act." The decision is based on no such conclusion.

The Commission in the investigation of the practices involved there found that the allowances permissible under section 15 (13), published in the respective tariffs for transportation services rendered by the shipper at the various plants under consideration, were in fact for no part of the service of transportation that the carriers were obligated to furnish under their line haul rates. Specifically "the industry performs no service beyond these points of interchange for which the carrier is compensated under its interstate line haul rates." We quote the pertinent part of the Court's decision:

"These findings are an adjudication by the Commission that the spotting service within the appellee's plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight. The statute contains this definition: The item 'transportation' shall include \* \* \* all services in connection with the receipt, delivery, elevation and transfer in transit \* \* \* of property transported. The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act and,



that after hearing it be of opinion that any regulation or practice of a carrier be *unjust or unreasonable or unjustly discriminatory* 'or otherwise in violation of the provisions of this Act', to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist. Section 15 (1)". (*Italics ours*).

The decision merely stands for the proposition that the publication of an allowance by virtue of section 6 (7) does not per se clothe the practice with immunity from the Commission's scrutiny in the performance of its various duties under the Act. The appellee has never controverted that position. We say insistently, however, that the opinion of the Court confirms appellee's claim that before the Commission can invalidate its tariff it must find the allowance or refund practice "unjust or unreasonable or unjustly discriminatory" which has not been done, nor will the facts in the instant case admit of such finding; or it must hold, supported by substantial evidence, that the practice is "otherwise in violation of the Act". As heretofore pointed out, the record will not sustain such a conclusion.

We have no quarrel with the many cases cited in the briefs of both carriers and the Commission to the effect that lodging a "forbidden discrimination" in a tariff does not clothe it with immunity. The answer is, that there is no "kinship" between them and the case at bar. Appellee's tariff operation as demonstrated by the record and the briefs of appellants, creates no discrimination, but on the other hand it insures equal rates to all shippers similarly circumstanced and equal opportunity between carriers to compete for the business.

At page 43 of the Commission's brief, Counsel makes this observation, quoting from the record:



"Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute." (R. 11).

Counsel then comments further quoting:

"In short the Commission's findings were not directed against the *end* which the appellee's tariff was intended to accomplish." (Italics ours).

With the results produced by appellee's tariff admittedly not subject to the Commission's "criticism" page 13, no question of the reasonableness of the practice is involved.

The opposing argument then rests on the suggestion that some other form of tariff be used such as "the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute." The record reflects the existence of through routes with joint rates between appellants and appellee on all commodities involved. If the carriers had been willing for appellee to become a party to its cut-back tariffs, the issue would not now be before this Court. And as stated by the Commission: "If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee) tariff \* \* \*" (R. 9). Speaking of the suggestion, learned counsel for the Commission at page 23 of his brief wisely observes: "Doubtless these steps were neither direct nor certain as to results \* \* \*." We submit the suggestion of the Commission is not only impractical but doomed to failure before undertaken since it is counter to the proviso in section 15 (3) of the Act that the Commission may not require any railroad to join in a through route that short hauls it.

We submit that the Commission admitting the "end" accomplished by appellee's tariff justifiable, shifted re-



sponsibility by its action "from the shoulders of the present to the shoulders of the days to come", and "left this particular carrier helpless in the interval", with the relief granted by the lower court a fitting corollary.

The case of *United States v. Pan-American Petroleum Co.*, 304 U. S. 156, cited at page 38 of the Commission's brief, involved questions foreign to the instant case. The Court held the contentions the same as those considered in *United States v. American S. & T. Plate Co.*, 301 U. S. 402, and foreclosed by the decision therein. We have heretofore distinguished that case from the one at bar. Suffice it to say, however, the Pan-American case involved allowances for terminal switching by various industries. There were many related and controverted facts from which the Commission reached its conclusion, and the Court observed that the value and weight of evidence and the inference to be drawn from it were for the Commission, and they were unable to say that "the Commission's orders were not based upon substantial evidence." We can see no analogy between that case and one here where there is no dispute in the evidence, the sole question being one of law.

The mechanics of appellee's tariff, its publication and the results produced when applied are not disputed. The standard used by the Commission to condemn it was solely to assert it violated certain provisions of the Transportation Act. A legal conclusion, we submit, unsupported by findings and properly reviewed and determined by the lower Court. Compare: *Florida v. United States*, 282 U. S. 193, 75 L. ed. 291.

The straw man raised in each of appellants' briefs is the false assumption that all refunds are forbidden and therefore appellee's tariff is the medium of an unlawful practice. It is not the refund that the Act, section 6 (7) forbids but secret departures from published tariffs.

We submit section 6 (7) remains a sanctuary for the published practice here involved unless a violation of some



other provision of the Act is established by substantial evidence; and we further submit that the lower Court was correct in holding that there was no such violation.

If the shield that protects these "cut-back" tariffs is truck competition it does not follow they can legally be turned into a sword to strike down competitive rail rates.

Appellants in their briefs repeatedly charge that their tariffs (R. 18 and 24) are not in issue (R. 65); and in their third assignment of error allege "the Court erred in holding that intervener's tariffs are very material to a correct solution of the validity of the plaintiff's tariff." All of which we submit is like contending that one charged with criminal assault has no right to interpose a plea of self defense.

We say again that in *Atchison, Topeka & Santa Fe Ry. Co. v. U. S., et al*, 279 U. S. 768, the right of the Columbus & Greenville to adopt and publish a tariff to remove the disability and discrimination to it and to the shipper is confirmed.

The decision in *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, 75 L. ed. 1227, and the opinion of Mr. Justice, now Chief Justice Stone, relied upon by appellant Commission is not contrary to the contention here made as to the lawfulness of the tariff in issue. In that case certain private contract warehouses at Philadelphia had been named by certain railroad companies as public freight stations, but they were not used as such, nor were all warehouses similarly situated given equal privileges with these particular warehouses.

The Court held that these private contract warehouses could not be compensated for services in transporting freight over certain railroad lines from freight charges, because all other similar warehouses were not treated uniformly. In other words, a carrier could not discriminate



between shippers under section 2 of the Act. The Court said:

"Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one—which it denies to another in like situation."

The findings of the Commission, the decision of the lower Court, and the brief of the Commission do not challenge the fact that the refund practice effected through appellee's tariff is consonant with natural equity. At most, there is suggested another but dubious route to accomplish the desired end, overlooking the main objective of the Act, "to have but one rate open to all alike and from which there could be no departure," *Boston & M. R. R. Co. v. Hooker*, 233 U. S. 97, *Interstate Commerce Commission v. B. & O. Ry. Co.*, 145 U. S. 265. The appellee's tariff does just that.

With deference, we submit that any further analysis of the cases relied upon by appellants to set aside the decision of the lower Court would needlessly prolong this brief.

### CONCLUSION

We submit that the conclusion of the Commission holding the tariff unlawful bore no relation to the legislative policy to be enforced by the Commission as announced in the sections of the Act cited by it, and that the effect of the decision, as stated in the dissenting opinion of Commissioner Splawn, "violates all principles of justness and fairness as it precludes respondent from participating in the outbound movement or in the through movement of



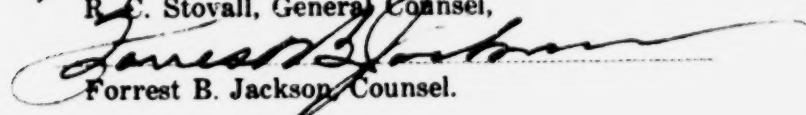
the traffic from origins on an equality of rates with the trunk lines." (R. 12).

We respectfully submit that the judgment of the lower Court should be affirmed.

COLUMBUS AND GREENVILLE RAILWAY CO.,

By 

R. C. Stovall, General Counsel,

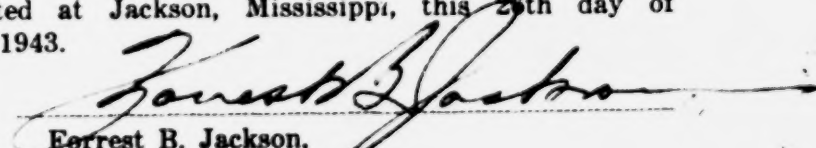
  
Forrest B. Jackson, Counsel.

Dated at Columbus, Miss.,  
March 26, 1943.

### CERTIFICATE

I hereby certify that I have this day mailed, postage prepaid, to each party of record, a true copy of this brief.

Dated at Jackson, Mississippi, this 26th day of March, 1943.

  
Forrest B. Jackson,

Of Counsel for Appellee.



MAY 21 1943

CHARLES EDWARD CROLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 628

INTERSTATE COMMERCE COMMISSION, J. M.  
KURN AND JOHN G. LONSDALE, TRUSTEES OF THE  
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL.,  
*Appellants,*

*vs.*

COLUMBUS AND GREENVILLE RAILWAY  
COMPANY,

*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION.

## ON REARGUMENT.

BRIEF FOR THE COLUMBUS AND GREENVILLE  
RAILWAY COMPANY, APPELLEE.

R. C. STOVALL,

*General Counsel, Columbus and  
Greenville Railway Company.*

FORREST B. JACKSON,

*Of Counsel.*



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**ON REARGUMENT.**

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**BRIEF FOR THE COLUMBUS AND GREENVILLE  
RAILWAY COMPANY, APPELLEE.**

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By leave of the Court first obtained, appellee submits this brief on the reargument of this case. Included in the appendix is the material requested by the Court at the reargument.

After the original argument of the case on April 7 and 8, 1943, it was by order of the Court restored to the docket



for reargument, with the request that counsel on the reargument direct their attention particularly to the following questions:

(1) Is freight tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

(2) Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes?

(3) What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?

(4) Have the courts power to require the Commission to take such procedure?

### (1)

Is freight tariff No. 81 in violation of any provision of the Interstate Commerce Act, as amended?

The appellee, by promulgating its tariff No. 81, in order to meet the competitive situation created by the "cut-back rates" of its competing trunk line carriers, Exhibits D and E (R. 18 and 24), was acting within its common law right to manage its property upon a plan which to it seemed necessary, sound and proper. Its right to initiate the tariff is confirmed by the decisions of this Court in *Interstate Commerce Commission v. Chicago Great Western Railway Company, et al.*, 209 U. S. 108, 118; *United States v. Illinois Central Railroad Company*, 263 U. S. 515.

Unless the tariff No. 81 violates some express provision



of the Interstate Commerce Act, as amended, the decision of the lower court holding that it did not must be sustained.

In the argument of this case, we insist that the appellants, along with the appellee, are confined to the facts as made by the record, and that there being no issue of disputed fact and the correctness of the Commission's findings therefrom, the Court's inquiry is confined to the correctness of the legal principles adopted by the Commission as a basis for reaching its conclusion.

These facts are not disputed: That the rates for the inbound movements of cottonseed are published in tariffs, local or joint, governing the movement to the mill point; that the rates on cottonseed products from the mill point are published in tariffs, local or joint, governing the movement from the mill point. (R. 8.) That the inbound shipments of seed move from origin points to the mills at the local rates under separate bills of lading. (R. 10.) That neither the cut-back tariff of appellee No. 81, nor the cut-back tariffs of appellants name rates by which the charge for the movement of the seed to the mill point is assessed. See Rule 30 (b), Illinois Central Tariff (R. 31, 47); Frisco Tariff, Item 5 (b) (R. 19); Columbus and Greenville Tariff, Item 5 (c) (R. 14). Neither the Illinois Central tariff nor the Frisco tariff shows the concurrence of any other carrier. The same is true of C. & G. tariff No. 81. The refunds or cut-back is exactly the same in amount in the tariffs of appellants and of appellee. (R. 9.)

At this point we wish to emphasize the fact that the appellants' tariffs do not limit the cut-back to seed which they originate but apply it to all seed that they move into the mill point, regardless of origin so long as they are the delivering carrier of the seed to the mill point. However, the quantum of the cut-back where the seed do not originate on appellants' lines is measured by the mileage from the junctions of connecting lines from which appellants



receive the seed shipments. We quote from Item 55, Frisco Freight Tariff No. 5162-T (R. 22):

“Item 55—Shipments From Connecting Lines

- “The rates shown herein also apply from junctions of the St. Louis-San Francisco Railway Company with connecting lines on shipments originating at points on connecting lines from which no through net rates are published, subject to the rules herein.”

Also we quote Rule 55 from Illinois Central Railroad Company tariff (R. 50):

“Rule 55—Shipments From Connecting Lines

“The rates published in Section No. 2 herein also apply from junctions of the Illinois Central Railroad, The Yazoo and Mississippi Valley Railroad, Fernwood, Columbia & Gulf Railroad, and/or Gulf and Ship Island Railroad with connecting lines, on shipments originating at points on connecting lines from which no through net rates are published, subject to the rules herein.”

This fact was called to the attention of the Court upon the reargument because, whether wittingly or unwittingly, the impression has been conveyed that a distinguishing line can be drawn between appellants' cut-back tariffs and appellee's cut-back tariff 81, in that the appellants' tariffs limit their cut-back or refund to seed originating on their line. This is not a fact. Hence the argument advanced by appellants that the rate, made up of the movement of seed to mill point from point of origin and the products from mill point under the joint tariffs to which appellee is also a party, is a through rate from origin of seed to destination of products, with orthodox privileges of milling in transit, is not correct.

It is true that the appellee, by its tariff I. C. C. No. 81, proposes to give to the shipper of the products manufactured from the rail seed the identical refund or cut-back that the appellants make under their individual cut-back tariffs, even though they did not move in over the line of



appellee. The Commission found that "the purpose of (appellee's) making the refund is to enable it to compete for traffic that might otherwise move outbound over the line that originated the seed." (R. 9.) Accurately speaking, the word "originated" has reference to the line delivering the seed to the mill point.

We further wish to call the Court's attention to the uncontradicted evidence contained in the unprinted record before the Court in I. & S. Docket No. 4599, that the oil mills located on appellee's line and at junction points with appellant carriers' lines had been in existence for thirty years or more prior to the appearance of cut-back tariffs in 1931, under the guise of truck competitive rates; that, prior to that time, appellant carriers and appellee had competed on equal terms for the outbound movement of products manufactured from cottonseed; and that the legality of the cut-back tariffs as such has never received the formal sanction of the Commission. In other words, they have not been put in issue, and even in the case at bar, the Commission avoids consideration of such tariffs in this language: "The legality of interveners' tariffs is not in issue." (R. 10.)

The Commission does say, however, that the purpose of appellant carriers' tariffs is to "induce the shipper to move the outbound products over their lines." (R. 9.) And they further found: "If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee's) tariff as the inbound shipments move from origin points to the mills at the local rates under separate bills of lading." (R. 9-10.) But for the existence of the appellant trunk line cut-back tariffs, there would be no justification for the appellee's tariff \$1, and same would never have been filed. The appellee insists, however, that it has a right to compete on equal terms from mill point to destination of the products where appellant carriers and appellee are parties



to through routes and joint rates covering these products as in the case at bar; that, when the seed move from origin points to the mills at the local rates under separate bills of lading, regardless of the carrier delivering the movement, the outbound traffic becomes free traffic in the sense in which that term was applied to the grain by the Supreme Court in *Atchison, T. & S. F. Railway Company v. United States*, 279 U. S. 768. Speaking of the attempted tie-up of outbound traffic by means of so-called transit tariffs, the Court said:

“This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. \* \* \* There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates.”

At the hearing in the case at bar, Stenographer's Minutes, pages 15-16, appellee committed itself to the proposition that it had no objection to the adoption by appellants or any connecting carrier of the same type of tariff here involved (L. C. C. No. 81); or, that it would eliminate cut-back features from its own rates and establish the so-called cut-back rates as the normal rate for the movement of seed if the connecting carriers would adopt this policy. We wish to emphasize this fact, for appellee has consistently contended that it is not seeking an advantage or preference that will be lost by the filing of a similar tariff by its competitors. Any charge that appellee by its tariff No. 81 is seeking an advantage over its competitors is without factual foundation.

We call the Court's attention to that part of our brief before the Commission entitled, “Cottonseed Allowances of the Columbus & Greenville Railway Company, Docket Number 28,590. Exceptions of Respondent to Report Proposed Herein by George M. Curtis, Examiner,” at page 8 thereof, which was read to the Court at the original argument on April 8, 1943, and at the reargument on



May 13, 1943. Same appears as Exhibit A, appendix herein.

It is apparent that the appellants' cut-back tariffs gave an advantage to the shippers of cottonseed products processed from seed that they transported to the mill point, regardless of origin, even though the products moved from the mill point over joint rates published in joint tariffs to which appellee was a party and that, as to these products, the appellee was precluded from competing on equal terms with the appellant carriers. The appellee's tariff 81 removed this inequality and established rates on the movement of the seed to the mill, the movement of the product therefrom, or the aggregate of both, identical with those available over competing carriers. (R. 8.)

The Commission, without specifying wherein the tariff provisions or the results reached through their operation were in conflict with the Act, condemned appellee's tariff No. 81 in the following language:

"The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4). The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act." (R. 10.)

We submit the phrase "form and manner" in connection with the context of the Commission's report of findings and conclusion therefrom is vague and meaningless. There is not one scintilla of evidence in this record of the contents of the Commission's Tariff Circular No. 20, which was alluded to in the argument of appellant carriers' counsel, nor has the Commission in its report directly or indirectly inferred that the size of paper, print, etc. of appellee's tariff did not conform to any of its rules. On the other hand, it has predicated its decision squarely upon the application of certain provisions of the Act, namely



Sections 1 (6), 6 (1), 6 (4), and 6 (7). At no point did the Commission point out wherein appellee's tariff was in violation of any of these sections.

This Court has consistently held that, for an order of the Commission to be valid, it must be based upon findings supporting its conclusions. On this point Mr. Chief Justice Hughes, speaking for the Court in *Florida v. United States*, 282 U. S. 194, at page 215, said:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company v. United States*, *ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

The pertinent parts of Section 1 (6) of the Act make it "the duty of all common carriers to establish, observe and enforce . . . just and reasonable regulations and practices affecting . . . rates or tariffs" and provides that "every unjust and unreasonable . . . regulation, and practice is prohibited and declared to be unlawful."

Clearly this section, *per se*, does not prohibit the cut-back practice prescribed in appellee's tariff but makes unlawful only those practices which are unjust and unreasonable.

In his original brief, page 43, the Commission's counsel stated:

"The Commission's findings were not directed against the *end* which the appellee's tariff was intended to accomplish." (Italics ours.)



And, at page 4 of his brief on reargument, speaking of appellee's tariff, counsel uses this language:

"It was not condemned on the ground that the rates, minus the refund made to the shipper, were either unreasonable or unjustly discriminatory or preferential \* \* \*."

In not one line of the report of the Commission is the practice effected by appellee's tariff described as unjust or unreasonable. Certainly a practice cannot be denominated unjust or unreasonable that accomplishes results as stated by the Commission in its report (R. 9 and 10):

"The refunds, or cut-back, are exactly the same in amount as those of the other carriers serving the mill points. \* \* \* The purpose of making the refund is to enable it (appellee) to compete for traffic that might otherwise move outbound over the lines that originated the seed. The originating lines hold themselves out to cut-back their local inbound rates on the seed which they originate in order to induce the shipper to move the outbound products over their lines. If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee's) tariff as the inbound shipments move from origin points to the mills at the local rates, under separate bills of lading."

We submit that no findings of the Commission supported the conclusion that appellee's tariff violates Section 1 (6) of the Act.

The next proposition is: Does the tariff violate Section 6 (1) of the Act?

This section requires that carriers file with the Commission schedules "showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad \* \* \* when a through route and joint rate have been established."

There is no issue in this case but that local tariffs setting



out the rates under which the cottonseed move to mill points have been duly filed and published with the Commission, nor is there any question about the proper filing and publication of joint tariffs with through routes and joint rates governing the charges for transportation of the products. The cut-back tariff of appellee, and those of appellants, are the separately established tariffs of the carriers and only prescribe rules and practices whereby allowances are made to the shippers of cottonseed products manufactured from seed that move to the mill point by way of rail. These tariffs do not name rates as the term is commonly accepted and only become operative after the movement of the products outbound under separate bills of lading have been completed. Such individual tariffs are plainly approved by Section 6 (1) in this language:

“The schedules printed as aforesaid by any such common carrier . . . shall plainly state . . . all privileges . . . granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, . . . and charges . . .”

Tariffs containing joint rates and through routes have been established, and there is no question but that they have been properly filed, published and concurred in. Included in the appendix, as Exhibits B and C, are the omnibus clauses contained in joint tariffs to which appellants and appellee are parties.

The provisions of the joint tariffs set out in Exhibits B and C in the appendix adopt and authorize any individual practice or privilege granted by parties to the joint tariffs whereby, in their separate tariffs, the through rate may be affected so long as the carrier granting the privilege does so upon its own responsibility. We submit that the cut-back tariff S1 of appellee, though it may affect the joint outbound rate by means of the omnibus clause re-



ferred to is concurred in, if such is necessary, by all carriers party to the joint tariff.

We further submit that appellee's tariff does not violate Section 6 (4) of the Act. This section deals with joint tariffs. Appellee's tariff 81 does not purport to be a joint tariff but is the separately established individual tariff of the Columbus and Greenville Railway Company promulgating rules and practices whereby allowances are made to shippers upon compliance with the conditions specified in the tariff. These allowances are the sole responsibility of appellee and only affect its part of the revenue received from the outbound haul of cottonseed products that move under joint tariffs, duly filed and established, to which appellants and appellee are parties.

The validity of appellee's tariff without the concurrence of other carriers is confirmed by the decision of this Court in *Central Railroad Company of New Jersey v. United States*, 257 U. S. 247. We quote from the opinion, page 255:

"Whether the privilege shall be granted or withheld is determined by local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of, and without consulting, connecting carriers."

The fact that the Commission has the power to require an individual carrier party to a joint rate to establish a transit privilege is not contrary to the fact that the granting or withholding of the privilege is the responsibility of the individual carrier, and the concurrence of the other carriers is not necessary. The authority of the Commission in that instance is exercised under its broad powers to correct a situation whereby discrimination or undue prejudice or undue preference exist in regard to certain shippers or localities because of the granting of, or failure



to grant, a transit privilege. The Commission does not hold that appellee's tariff is unduly prejudicial or unduly advantageous to any shipper.

We submit further, for the sake of argument, that the failure of the appellant carriers to concur in appellee's tariff is without legal significance. But, if we are mistaken in this point, we most emphatically urge that, under the omnibus clause of the joint tariffs, as pointed out in our discussion of Section 6 (1) of the Act, the carriers parties to the joint outbound rate have concurred in the establishment of the individual transit privileges of appellee's tariff 81 so long as they remain the sole responsibility of appellee, which is the case at bar.

The omnibus clause states clearly under the heading "Terminal, Transit and Other Privileges and Charges": "The granting of the privileges . . . shall be entirely upon the responsibility and at the cost of the carrier granting the privileges . . . and without requiring the participation therein of any other carrier in the absence of authority therefor from such other carrier."

Section 6 (7) of the Act is not violated by appellee's tariff. This section in its application to the case at bar only provides that a carrier shall not engage or participate in the transportation of property without first filing and publishing its tariff of the rates and charges for same; and it prohibits any carrier from refunding or remitting in any manner or by any device any portion of the rates or charges "except such as are specified in such tariffs."

The purpose of this section was to have one rate applicable to all. It was to avoid favoritism toward one shipper as against another. We submit that the appellee's tariff gives no secret refund of any part of the transportation charge but is a published method, open to all who fulfill its requirements, and it does not result in undue preference or disadvantage to persons or traffic similarly situated. The filing and publication of the tariff fulfill the require-



ments of this section, which only prohibits refunds not specified in the tariff.

The facts in the instant case are unlike the facts in the case of *Kansas City Southern Railway Company v. Albers Commission Company*, 223 U. S. 573. There the suit against the Railway Company was predicated upon a special agreement embodying a rate schedule that was not filed with the Interstate Commerce Commission. In reversing the judgment of the Supreme Court of Kansas that had affirmed a lower court decision, whereby the shipper had recovered a judgment under the special rate agreement, this Court, in part, said:

“The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed.” 223 U. S. 597.

We submit the fact that appellee's tariff has been duly published and filed with the Commission removes it from any criticism that appellants might attempt to make by comparing the situation with that which existed in the Albers case above.

The appellant carriers have insisted before this Court that, if the decision of the lower court is sustained and appellee's tariff under the circumstances approved, it would create a chaotic condition in the rate structure of the country. No justification for this statement is found in the record. The Commission certainly did not indicate any such reason as a ground for its decision.

We have quoted at length, page 10 of our original brief, from the decision of this Court in *United States of America, et al. v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.*, 294 U. S. 499. We wish again to direct the



Court's attention to that case because of its discussion of a number of points that have been raised in the case at bar. The Court there held that the disruption and disturbance of a rate structure, without more, could not be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle.

(2)

Assuming that this question is answered in the affirmative, would the cancellation of this tariff operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight originating on carriers with which the Columbus and Greenville Railway competes? ≈

Although we emphatically deny the existence of any support in the record for an affirmative answer to question (1) above, we would again emphasize the extent to which cancellation of our tariff No. 81 would operate unfairly and unreasonably in view of the outstanding cut-back tariffs on freight delivered to mill points by carriers with which the Columbus and Greenville Railway competes.

The outbound products manufactured from the seed brought into the mill points over appellant carriers' lines move under separate bills of lading; that is, the seed inbound constitute a separate journey, and upon arrival at the mill point, the freight charges are paid, and all obligations between the shipper, carrier and consignee are terminated. However, though the appellee has available through routes and joint rates in tariffs to which it is a party, commonly called joint tariffs, it cannot compete on equal terms with appellant carriers if its tariff No. 81 is canceled for the reason that the appellant carriers' cut-back tariffs, by holding out a refund to the carrier in the event he ships the products over their lines, will control the business. This is emphasized by the testimony of



appellants' witness Hall, who stated in answer to questions propounded by counsel for appellee as follows:

"Q. Now, assume that the tariff of respondent, I. C.  $\epsilon$ , No. 81, is cancelled. If that shipper elected to ship out over the C. & G. instead of over your line, wouldn't it cost him a premium?

"A. No.

"Q. He would not get a refund under your tariff, would he?

"A. He would be silly to ship out over the C. & G.

"Q. That doesn't answer the question, Mr. Hall.

"A. I think it does.

"Q. You said he would be silly to ship. Why should he be silly?

"A. Because he would lose money."

Stenographers' Minutes Before The Interstate Commerce Commission, Docket No. 28,590, page 41.

Commissioner Splawn, in his dissenting opinion, commenting on the decision of the Commission, used this language:

"The effect of the decision violates all principles of justness and fairness as it precludes respondent from participating in the outbound movement or in the through movement of the traffic from common origins on an equality of rates with the trunk lines." (R. 12.)

### (3)

What considerations of law, procedure or policy may be urged against the Commission's following the procedure, prior to the cancellation of the tariff, of bringing other carriers into the proceeding pending before it, or into an independent proceeding, and in such proceeding making an appropriate adjustment of rates as between respondent and other carriers?

By virtue of the broad powers vested in the Commission under Section 15 of the Act, it had the authority, prior to



the cancellation of the tariff, to bring other carriers into the proceeding and there make an appropriate adjustment of the tariffs of appellants and appellee that would create a situation fair to each in their rights to compete for business originating at common mill points.

The proceeding in this case was instituted upon the Commission's own motion. Appellant carriers appeared as interveners. They had appeared as protestants in a previous hearing in I. & S. Docket No. 4599, 238 I. C. C. 309, which involved questions similar to the instant case. The record in that case was made part of the record in this case, with the distinct understanding that "the findings of fact in the prior report were not to be considered conclusive in this proceeding." (R. 6.) The appellee's case there, as here, was predicated upon the necessity of overcoming the disadvantage that appellant carriers' tariffs had placed against it in its efforts to compete on equal terms for traffic originating at common points and moving outbound under tariffs to which appellants and appellee were parties to joint rates and through routes.

The Commission indicated in its report (R. 11), that there was another method open to the appellee "to accomplish the end desired by proportional rates through procedure authorized by the statute."

It was within the power of the Commission, recognizing that the end desired by appellee was not open to criticism, to have held its decision in abeyance and have brought all necessary parties into the proceeding and effected an adjustment. Appellee urged the Commission to do this in the concluding part of its brief, which is included in Appendix A hereto.

The establishment of proportional rates, since the appellee and also the appellants in many instances do not reach the primary markets of the cottonseed products, is not practicable, and counsel for the Commission, in his original brief, recognizes this fact. But there is a simple, prac-



viable method to effect the adjustment, which is the cancellation of the cut-back tariffs of both appellants and appellee, thereby permitting the cut-back rate on seed to become the normal rate. This would not constitute a reduction in the inbound rate on the seed. It would not reduce the carriers' revenue but would only eliminate what might be described as a penalty charge inbound that is returned to the shipper if he selects the same carrier in shipping his products outbound.

## (4)

Have the courts power to require the Commission to take such procedure?

We submit any extended discussion of this question would unnecessarily prolong this brief, but it is our opinion that the courts are without power to direct the administrative functions of the Commission, which would necessarily be involved in a proceeding as suggested in question (3).

In conclusion, we submit that the question is not whether some other means were available to the appellee in accomplishing the end desired, but whether the method used violated the Act. It is appellee's position that its effort undertaken "in the manner and form" prescribed in its tariff No. 81, to gain a larger share of the business for which it is entitled to compete, is sustained by the decisions of this Court in the *Atchison Case*, the *Milwaukee Case*, and the *Central Railroad of New Jersey Case*, heretofore referred to, and that there does not emerge from the Commission's findings any violation of the Interstate Commerce Act, as amended.

Respectfully submitted,

R. C. STOVALL,

*General Counsel, Columbus and  
Greenville Railway Company.*

FORREST B. JACKSON,

*Of Counsel.*



## APPENDIX.

### EXHIBIT A.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

Cottonseed Allowances of the Co-  
lumbus & Greenville Railway } Docket Number 28,590.  
Company.

### EXCEPTIONS OF RESPONDENT TO REPORT PRO- POSED HEREIN BY EXAMINER GEORGE M. CURTIS.

#### “CONCLUSION.

“If the tariff I. C. C. No. 81, is to be condemned and held unlawful, then by the same token, the so-called ‘cut-back rates’ of interveners are unlawful and should be condemned, because such tariffs have created the conditions making necessary, under the natural law of self-preservation, the adoption of rate policy here considered.

“If the findings of the Examiner are to prevail in the conclusions reached, then, with deference, we request that final order herein be held in abeyance until such time as there may be a complete investigation and determination of the lawfulness of the ‘cut-back’ tariffs.

“The determination of the lawfulness of said ‘cut-back tariffs and rates’ may be concluded before the beginning of another season for the movement of cottonseed, and the condemnation of C. & G. Tariff No. 81 will not now affect the movement of seed during the present season since cottonseed in the area served have all practically moved to mill points or will move before effective date of an order herein.

“We, therefore, with deference, respectfully submit that these exceptions should be allowed, the tariff found lawful and the proceedings dismissed; and, if in error in this contention, then that final order be held in abeyance until fur-



ther consideration of the competitive 'cut-back rates' as to lawfulness may be had by the Commission.

"We urge that any order of this Commission holding Respondent's tariff No. 81 unlawful will be in violation of Respondent's rights as guaranteed by the Fifth Amendment to the Federal Constitution.

"Oral argument before the entire Commission is requested.

"Respectfully submitted,

COLUMBUS & GREENVILLE RAILWAY  
COMPANY,

By R. C. STOVALL,

*General Counsel,*

FORREST B. JACKSON,

*Counsel.*

"Dated at Columbus, Mississippi,  
September 1, 1941."



## EXHIBIT B.

AGENT ROY POPE'S TARIFF 714, ICC 114, EFFECTIVE JUNE 1,  
1936.

## RULES AND REGULATIONS—GENERAL.

Item 100.

## TERMINAL, TRANSIT AND OTHER PRIVILEGES AND CHARGES.

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be subject to all terminal charges and services, and all allowances relating to:

Arbitraries	Inspection
Car Rental	Mileage on private cars
Car Service	Milling
Cleaning	Mixing
Clipping	Overloaded cars,
Demurrage	handling of,
Diversion	Reconsignment
Drayage	Refining
Elevation	Refrigeration
Grading	Sacking
Grain doors	Shelling
Handling	Storage
Icing	Switching
	Transit privileges
	Wharfage

together with all other privileges, charges and rules which in any way increase or decrease the amount to be paid on any shipment between points named in this tariff, or which increase or decrease the value of the service to the shipper, as provided in tariffs published and lawfully on file with the Interstate Commerce Commission.

The granting of the privileges and performances of the services described in this item shall be entirely upon the responsibility and at the cost of the carrier granting the privileges or performing the services, and without requiring the participation therein of any other carrier in the absence of authority therefor from such other carrier.



## EXHIBIT C.

EXCERPT FROM AGENT R. H. HOKE'S MISSISSIPPI TARIFF 714-A  
ICC No. 322.

Item 100-B (Cancels Item 100-A of Supplement 4.)

TERMINAL OR TRANSIT PRIVILEGES OR SERVICES.

In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules and regulations of originating carriers parties to this tariff, for property while in their possession, and of any of the intermediate or delivering carriers parties to this tariff for property while in their possession, as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission as to interstate traffic, and with State Commission covering traffic subject to its jurisdiction, for

Terminal or transit privileges or services, including also

Car rental	Private car mileage
Car service	Reconsignment
Cartage	Refrigeration
Demurrage	Stop-off
Diversion	Storage
Elevation	Switching
Heater service	Transfer
Icing	Transit privileges
Lighterage	Unloading
Loading	Weighing

The granting of the privileges and performance of the service described in this item shall be entirely upon the responsibility and at the cost of the carriers granting the privileges and performing the services and without affecting the revenue of any other carrier in the absence of authority therefor from such other carrier.

(Auth. DA 60785 / 12-14-38.)



# SUPREME COURT OF THE UNITED STATES.

No. 628.—OCTOBER TERM, 1942.

The Interstate Commerce Commission,  
J. M. Kurn, et al., Trustees, St.  
Louis-San Francisco Railway Com-  
pany, et al., Appellants,  
vs.  
Columbus and Greenville Railway  
Company.

On Appeal from the Dis-  
trict Court of the United  
States for the Northern  
District of Mississippi.

[June 7, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

This case is here on direct appeal from a decree of a specially constituted District Court of three judges<sup>1</sup> enjoining the enforcement of an order of the Interstate Commerce Commission cancelling certain "cut-backs" on cottonseed and its products contained in appellee's I. C. C. Tariff No. 81.<sup>2</sup>

The appellee operates 168 miles of railway extending east and west within the State of Mississippi. Cottonseed and its products, to which the tariff in question relates, are important items of traffic in the region, and there are cottonseed mills at a number of points on appellee's line. Appellee originates about 15 or 20 per cent of the cottonseed milled there; trucks originate about 50 per cent; and the balance comes to the mills on other lines with which the appellee connects at these points, including the Illinois Central Railroad Company, the Mobile & Ohio Railroad Company, the St. Louis-San Francisco Railroad Company, and the Yazoo and Mississippi Valley Railway Company.

Since 1931, these railroads and appellee have maintained a system of cut-backs originally designed, and successively revised, for the purpose of meeting the competition of truck lines. Speaking generally, the system permitted one who shipped cottonseed into the mill point and paid the full local rate for that inbound

<sup>1</sup> Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, ~~219~~ 220, 28 U. S. C. §§ 47, 47a; § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

<sup>2</sup> 248 I. C. C. 441; 46 F. Supp. 204.



haul to receive back part of the amount so paid if he later shipped the product outbound by the same carrier. If the outbound haul was not by the carrier that had made the inbound haul, he was not entitled to the cut-back.

To better its position with respect to the outbound hauls of cottonseed originated by other lines, appellee took measures which it calls "self-help to meet competition." It sought by its I. C. C. Tariff No. 81 to establish schedules of payments to shippers which would give them the benefit of the cut-backs on cottonseed and its products shipped outbound over its line, whether the inbound haul was over its own line or over a connecting line. This tariff was neither protested nor suspended, and became effective October 16, 1938. After the Commission's Bureau of Traffic had criticized this tariff and requested its correction, appellee filed its I. C. C. Tariff No. 83, differing in immaterial particulars from its Tariff No. 81. The Commission ordered No. 83 suspended and entered upon an investigation of its lawfulness.<sup>3</sup>

In its report,<sup>4</sup> Division 3 of the Commission held: The suspended tariff was an effort to reduce the outbound joint rates, established to points beyond appellee's line with the concurrence of the participating carriers, without obtaining their concurrence in such reduction, and therefore it violated § 6(4) of the Act.<sup>5</sup> The suspended schedules did not "lawfully name or provide any legal rates whatsoever,"<sup>6</sup> and were in violation of § 6(7),<sup>7</sup> since the contemplated "refund would be, essentially, a rebate, whereby the property would be transported from the mill point to the destination on another line at a lower rate than that named in the joint tariff published and filed by the several carriers participating in the movement and lawfully in effect. . . . Respondent's suspended tariff, granting an alleged allowance to the shipper notwithstanding that he performs no part of the transportation ser-

<sup>3</sup> 15(7) Interstate Commerce Act, 49 U. S. C. § 15(7).

<sup>4</sup> 238 I. C. C. 309.

<sup>5</sup> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties." 49 U. S. C. § 6(4).

<sup>6</sup> 238 I. C. C. at 315.

<sup>7</sup> "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are trans-



vice, as the result of which he would obtain the out-bound transportation at less than the rates lawfully in effect would constitute an unreasonable practice, in violation of section 1(6)<sup>8</sup> and other provisions of the Interstate Commerce Act."<sup>9</sup> Although not shown to be unlawful as applied to traffic originated and carried to the mills by appellee over its line, the tariff was defective in the proposed form, and should be cancelled.

The Commission then of its own motion entered upon an investigation of the lawfulness of appellee's I. C. C. Tariff No. 81, which had remained in effect as the result of the suspension of No. 83.

The brief and not altogether clear opinion of the full Commission concluded with the statement that "We find that, to the extent respondent's tariff I. C. C. No. 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1(6), section 6(4), and section 6(7) of the Interstate Commerce Act."<sup>10</sup> From this and other statements contained in the opinion of the full Commission it appears that the Commission shared the views of Division 3 as to the effect of the schedule upon the outbound joint rates and the unlawfulness of that effect. The Commission's view that the tariff operated to reduce such outbound rates without the concurrence of the participating carriers is at least a tenable one, and one we are not disposed to gainsay. When that view is taken, violation of § 6(4)<sup>11</sup> is clear. With the impropriety of the tariff under § 6(4) established, the Commission could reasonably conclude that its operation entailed violations also of §§ 1(6) and 6(7).<sup>12</sup>

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ported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 49 U. S. C. § 6(7).

"It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce . . . just and reasonable regulations and practices affecting classifications, rates, or tariffs. . . . and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." 49 U. S. C. § 1(6).

<sup>8</sup> 238 I. C. C. at 317-318.

<sup>10</sup> 248 I. C. C. at 446. For the texts of §§ 1(6), 6(4) and (7), see footnotes 8, 5 and 7, *supra*.

<sup>11</sup> For the text, see footnote 5, *supra*.

<sup>12</sup> For the texts, see footnotes 8 and 7, *supra*.



Disregard of the statutory requirements for the establishment of joint tariffs may have important substantive consequences. The Interstate Commerce Act contemplates that joint railroad rates shall be established only by concurrence of the participating carriers or by the Commission in proceedings under § 15.<sup>13</sup> In the exercise of its power under § 15 to fix joint rates without the concurrence of the participating carriers, the Commission is required by § 15(4) to protect, in stated circumstances, the long hauls of participating carriers, and to give reasonable preference to originating carriers.<sup>14</sup> The appellant railroad carriers claim, with what foundation we do not decide, to be entitled to protection in both regards, and that to deny them such protection may force the abandonment of branch lines which Congress sought by amendment to § 15(4) to avoid. It is said that in recent years the Illinois Central System has already abandoned branch lines in Mississippi having greater mileage than the whole of appellee's line.<sup>15</sup> Division 3 found that the existing cut-back rates were "extremely low, averaging only about 8.5 percent of the first-class rates, whereas in the general cottonseed proceeding the Commission prescribed 18.5 percent of first class as reasonable, and that these low cut-back rates can be justified only in consideration of the in-bound carrier's obtaining the out-bound movement."<sup>16</sup> The full Commission reiterated Division 3's further finding that "In-

<sup>13</sup> § 15(3), 49 U. S. C. § 15(3).

<sup>14</sup> "In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. . . . 49 U. S. C. § 15(4).

<sup>15</sup> See, e.g., *Abandonment of Line By Mississippi Valley Co. and Illinois Central R. R.*, 145 I. C. C. 289; *Abandonment of Branch Line By Y. & M. V. R. R. Co.*, 145 I. C. C. 393; *Helm and Northwestern Railroad Abandonment*, 170 I. C. C. 33; *Gulf & Ship Island R. R. Co. Abandonment*, 193 I. C. C. 749; *Y. & M. V. R. R. Co. Abandonment*, 249 I. C. C. 561; *Y. & M. V. R. R. Co. Abandonment*, 249 I. C. C. 613.

<sup>16</sup> 238 I. C. C. at 314.



stead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier."<sup>17</sup>

Although it appears that by far the greatest part of the outbound traffic over the appellee's line moves beyond on the lines of connecting carriers at jointly established rates, it appears that some traffic does reach its ultimate destination at points along appellee's line. It was apparently with reference to this traffic that the Commission stated that "the form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6(1),"<sup>18</sup> which provides, *inter alia*, that "If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, . . . the separately established rates, fares, and charges applied to the through transportation."<sup>19</sup> The challenged tariff provided that upon shipment outbound over appellee's line "the freight charges . . . to the manufacturing or mill point will be reduced" in stated amounts, although such charges had been made by other carriers in accordance with their own tariffs for transportation over their own lines. That the Commission may hold that a carrier in "separately establishing" its rates for a portion of a through haul must not purport to alter the rates established by connecting lines, surely is a permissible construction of § 6(1).

Whether cut-backs even as applied to previous transportation over the carrier's own lines are ever permissible under the Act, we do not decide; and, like the Commission, we express no opinion whether the particular cut-backs employed by appellee's competitors are valid. We simply hold that, whatever may be the appellee's rights in appropriate proceedings, cf. *Atchison, T. & S. P. Ry. Co. v. United States*, 279 U. S. 768, the appellee may not realize upon them by means which the Commission has properly found to be unlawful.

*Reversed.*

<sup>17</sup> 238 I. C. C. at 313; 248 I. C. C. at 445.

<sup>18</sup> 248 I. C. C. at 445.

<sup>19</sup> 49 U. S. C. § 6(1).



Mr. Justice DOUGLAS, concurring.

Commissioner Splawn dissented from the report of the Commission in this case. 248 I. C. C. 441, 446-447. He noted that respondent's tariff "in no wise affects the amount of the rates paid for the inbound service to the mill point", its only effect being to "reduce the outbound rate and thus make applicable the same rate as applies when the outbound haul is performed entirely by the trunk lines." In his view the outbound traffic is "free" traffic as that term was used in *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768. That is to say, "it is traffic which has previously moved in on local or joint rates to the milling point and has there come to rest." Hence the fact that respondent is not a party to the inbound rates is "without legal significance." Commissioner Splawn concluded that the decision of the Commission violated "all principles of justness and fairness as it precludes respondent from participating in the outbound movement or in the through movement of the traffic from common origins on an equality of rates with the trunk lines." The fact that no other carrier is a party to respondent's tariff containing the cut-back provision and that respondent absorbs the allowances out of its proportion of the joint outbound rate was unimportant in his view. As he stated, "The identical facts are true of the tariffs and practice of at least one of the intervening trunk lines"—tariffs which concededly constituted the necessity for respondent's tariff. Moreover, as he observed, "there can be no doubt that the provision is lawful as to out-bound traffic to points reached by respondent over its line." That traffic would seem to be as "local" as the transit privilege which this Court held in *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, a carrier might establish for its individual tariff, even though there was a joint through route with joint rates. So I would be inclined to support the judgment of the court below in setting aside the order of the Commission at least to the extent that the court allowed the tariff to apply on outbound traffic to points on respondent's own line.

But I am voting for a reversal of the judgment of the court below in the view that the case should be returned to the Commission for adequate findings.

Although there are two reports on this problem—one by the



full Commission and one by a division of the Commission—they have an obscurity and vagueness which two full arguments before this Court have not dispelled. Commissioner Splawn complained without success of the lack of findings under § 1(6), § 6(1), and § 6(4). But if we pass by those deficiencies and cut and sew the meager materials at hand into the pattern which we guess the Commission had in mind, there are still important questions left unanswered. (1) The tariffs containing the joint outbound rates specifically authorize "privileges, charges and rules" to be covered by separate tariffs even though the joint or through rate is affected, provided the carrier granting the privilege does so upon its own responsibility and at its own cost. We are not informed why that provision does not authorize appellee's proposed tariff at least to the extent that it applies to outbound traffic to points on appellee's line. (2) If concurrence of the other carriers to appellee's tariff is necessary, we are not told why the foregoing provision of the joint tariff is not adequate. (3) In case that provision of the tariff covering joint rates is not applicable, there is another phase of the problem which is in the dark. The Commission does not seem to deny that this traffic was "free" traffic within the rule of *Atchison, T. & S. F. Ry. Co. v. United States*, *supra*. It was merely concerned with the "form and manner" of the tariff. But we are not told why appellee's tariff is not within the rule of *Central R. Co. of New Jersey v. United States*, *supra*, so far as the tariff specifies the rate from milling points to destinations on appellee's line. The rule governing the right of carriers to initiate rates has not changed. *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506.

Mr. Justice Cardozo speaking for the Court stated in that case, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." 294 U. S. p. 511. That was said about another obscure and vague report of the Interstate Commerce Commission. We should say the same thing about the present report. The questions left unanswered by this report may be simple ones to experts. But we should have those answers before we put the imprimatur of this Court on the Commission's order.

Mr. Justice BLACK, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE join in this opinion.